

United States 11  
Circuit Court of Appeals  
For the Ninth Circuit.

---

EUGENE J. WESTPHALEN, CHARLES ZAN-  
ELLA and AETNA CASUALTY AND  
SURETY COMPANY, a corporation,  
Appellants,

vs.

BANKERS INDEMNITY COMPANY,  
a corporation,  
Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

FILED

DEC 17 1942

PAUL P. O'BRIEN,  
CLERK



No. 10286

---

United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

EUGENE J. WESTPHALEN, CHARLES ZAN-  
ELLA and AETNA CASUALTY AND  
SURETY COMPANY, a corporation,  
Appellants,

vs.

BANKERS INDEMNITY COMPANY,  
a corporation,  
Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division





## INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Answer of Defendant Denman R. Curry.....	46
Answer of Defendant Julius Petersen.....	44
Answer of Defendant Fred E. Tunzi.....	41
Answer of Defendants Eugene J. Westphalen and Aetna Casualty and Surety Company..	36
Answer of Defendant Charles Zanella.....	50
Appeal:	
Certificate of Clerk to Transcript of Rec- ord on .....	136
Designation of Record, Appellants' Amended .....	139
Designation of Record on (DC).....	131
Notice of .....	130
Statement of Points and Designation of Record on (CCA).....	138
Statement of Points Upon Which Appel- lants Intend to Urge Upon (DC)....	132
Certificate of Clerk to Transcript of Record on Appeal .....	136

	Index	Page
Complaint .....		2
Exhibit A—Copy of Automobile Liability Policy No. CB34576 and Endorsements, Bankers In- demnity Ins. Co., Issued to Fred E. Tunzi.....		14
Conclusions of Law.....		68
Designation of Record, Appellants' Amended.		139
Designation of Record on Appeal (CCA)....		138
Designation of Record on Appeal (DC).....		131
Findings of Fact and Conclusions of Law...		59
Injunction, Temporary .....		40
Judgment and Decree.....		70
Memorandum and Order for Judgment.....		53
Names and Addresses of Attorneys.....		1
Notice of Appeal.....		130
Statement of Points and Designation of Rec- ord on Appeal (CCA).....		138
Statement of Points Upon Which Appellants Intend to Urge Upon Appeal (DC).....		132
Stipulation re Answer of Westphalen and Aetna Casualty and Surety Co.....		49
Temporary Injunction .....		40
Transcript of Testimony.....		73

Witness for Defendant:

Petersen, Julius

—direct ..... 124

Witnesses for Plaintiffs:

Anderson, John R.

—direct ..... 89

—cross ..... 92

Curry, Denman R.

—direct ..... 98

—cross ..... 114, 116

Kay, J. W.

—direct ..... 94

—cross ..... 96

Tobin, Leonard R.

—direct ..... 117

—cross ..... 118

—redirect ..... 124

Tunzi, Fred E.

—direct ..... 73

—cross ..... 88



NAMES AND ADDRESSES OF  
ATTORNEYS

ALBERT M. HARDIE, ESQ.,  
414 - 13th Street,  
Oakland, California

ELLIOT JOHNSON, ESQ.,  
Central Bank Building,  
Oakland, California

MESSRS. TAFT AND SPURR,  
Marks Building,  
Ukiah, California

Attorneys for Defendants and Appellants.

CHARLES B. MORRIS, ESQ.,  
CARROLL B. CRAWFORD, ESQ.,  
Mills Building  
San Francisco, California

Attorneys for Plaintiff and Appellee.

In the District Court of the United States In and  
For the Northern District of California,  
Southern Division

No. 21865S

BANKERS INDEMNITY INSURANCE COM-  
PANY, a Corporation,

Plaintiff,

vs.

EUGENE J. WESTPHALEN, CHARLES ZA-  
NELLA, FRED E. TUNZI, JULIUS PETER-  
SEN, DENMAN R. CURRY and AETNA  
CASUALTY AND SURETY COMPANY, a  
Corporation,

Defendants.

### COMPLAINT AND PETITION FOR DECLARATORY JUDGMENT

Plaintiff, Bankers Indemnity Insurance Com-  
pany, a Corporation, brings this suit under and  
pursuant to the Federal Declaratory Judgment Act  
(Judicial Code, Section 274 d, 28 U. S. C. A., Sec-  
tion 400) and alleges:

#### I.

That plaintiff, Bankers Indemnity Insurance  
Company, is now and was at all times herein men-  
tioned a corporation organized and existing under  
and by virtue of the laws of the State of New  
Jersey, duly authorized and licensed to do busi-

ness in the State of California, and having its principal place of business within the State of California in the City and County of San Francisco.

[1\*]

## II.

That defendant Eugene J. Westphalen and defendant Charles Zanella are citizens of the State of California and reside at Willits, Mendocino County, California; that defendant Fred E. Tunzi is a citizen of the State of California and resides at or near Petaluma, Sonoma County, California; that defendant Julius Petersen is a citizen of the State of California and resides at or near Novato, Marin County, California; that defendant Denman R. Curry is a citizen of the State of California and resides at or near Napa, Napa County, California; that defendant Aetna Casualty and Surety Company is a corporation organized and existing under the laws of the State of Connecticut.

## III.

That the amount in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars (\$3000.00).

## IV.

That this suit is brought under and pursuant to the Federal Declaratory Judgment Act (Judicial Code, Section 274d, 28 U. S. C. A., Section 400).

---

\*Page numbering appearing at foot of page of original certified Transcript of Record.

## V.

That on or about the 11th day of July, 1940, plaintiff issued a policy of automobile liability insurance numbered CB34576 to defendant Fred E. Tunzi; that the policy period was from July 1, 1940, to July 1, 1941, and said policy has been in effect from July 1, 1940, to the date of this complaint; that in said policy plaintiff agreed with defendant Fred E. Tunzi to pay on behalf of said Fred E. Tunzi, subject to the limits of liability, exclusions, conditions and other terms of said policy, all sums, not exceeding \$10,000.00 for each person and not exceeding \$20,000.00 for each accident, which defendant Fred E. Tunzi should become obliged to pay by reason of the liability imposed upon him by law for damages, including damages for care and [2] loss of service, because of bodily injury, and not exceeding \$5000.00 because of property damage, sustained by any person or persons caused by accident and arising out of the ownership, maintenance and use of two certain automobiles and two certain trailers described in said policy as (1) 1938 Fageol 6, Serial No. E729, Motor No. 401943; (2) 1937 Reliance Trailer (20 foot) Serial No. 37318; (3) 1928 Fageol Diesel, Serial No. 9143, Motor No. 471,215; (4) 1929 Reliance Trailer (20 foot) Serial No. 2631; that said policy further provides that the purposes for which said two automobiles and said two trailers are to be used are "Commercial purposes"; that said policy expressly provides that said automobiles "will be



principally garaged and used” in the town of Novato, California; and further provides that the insurer, plaintiff herein, should not be liable for loss or damage caused while any automobile involved therein was rented under contract or leased; that by an endorsement appended to said policy and bearing even date therewith, it was specifically provided that in consideration of the premium at which the said policy was issued it was warranted by the insured that, subject to the territorial limitations of such policy, the regular and frequent use of the commercial type vehicles described in such policy “is and will be confined to the territory within 100 miles of Novato”; that the originals of said policy and said endorsements are on file with the Railroad Commission of the State of California; that a true copy of said policy and endorsements is attached hereto, marked “Exhibit A,” and the same is made a part hereof.

## VI.

That on July 1, 1940, when the aforesaid commercial truck and trailer policy No. CB34576 became effective, the trucks and trailers covered thereby were owned by the insured Fred E. Tunzi of Petaluma, Sonoma County, California, who was the legal and registered owner thereof, but said trucks and trailers were in [3] fact being operated by one Julius Petersen in and around the town of Novato, Marin County, California, and their regular and frequent use was within 100 miles thereof;

that on or about the 8th day of December, 1940, the truck designated in the aforesaid policy CB34576 as 1938 Fageol 6, Serial No. E729, Motor No. 401943, and bearing California license 1940 No. BE 14682, and 1929 Reliance Trailer, Serial  
PT

No. 2631 were returned to their owner, defendant Fred E. Tunzi, at Petaluma, Sonoma County, California, and by him rented under contract or leased to defendant Denman R. Curry of Napa, Napa County, California.

## VII.

That following the renting under contract or leasing of the said 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631 to defendant Denman R. Curry as aforesaid, no alteration or modification was made or requested by the insured in the terms or conditions of said policy No. CB34576, except that on the 2d day of January, 1941, by a special endorsement made at the request of said defendant Fred E. Tunzi, the name of the insured therein was corrected by plaintiff to read: "Fred E. Tunzi and Julius Petersen"; that said endorsement, dated January 2, 1941, was filed with the Railroad Commission of the State of California on the 3d day of January, 1941; that a true copy of said endorsement is attached to the said policy, "Exhibit A" hereto and the same is made a part hereof.

## VIII.

That after the said 1938 Fageol 6 truck, Serial No.

E729, and 1929 Reliance Trailer, Serial No. 2631, were, by their owner, defendant Fred E. Tunzi, rented under contract or leased to defendant Denman R. Curry, as aforesaid, said truck and trailer, or either of them, were not garaged at or near Novato, California, but from on or about the 8th day of December, 1940, to the 14th day of January, 1941, the day of the hereinafter mentioned [4] accident, said truck and trailer were garaged at or near Napa, California; that during said period from December 8, 1940, to January 14, 1941, said 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631, were not regularly and frequently used or used at all in making trips of within 100 miles of Novato, California, but were used during December, 1940, in making at least two round trips between Napa, California, and San Diego, California a distance in an airline of more than 450 miles each way, for the purpose of hauling basalt bricks or other basalt products on the southward journey; that during the period from January 1, 1941, to January 14, 1941, said truck and trailer were used in making at least three round trips, exclusive of the one on which the hereinafter mentioned accident happened, between Napa, California, and Piercy, California, a distance in an air line of approximately 140 miles each way, for the purpose of hauling grape sticks on the southward journey.

## IX.

That while returning southward toward Napa on

a fourth trip on or about the 14th day of January, 1941, at about the hour of 12:30 A.M., while traversing Highway 101, commonly known as the Redwood Highway, at a point about 4½ miles north of the town of Willits, Mendocino County, California, said 1938 Fageol 6 truck and said 1929 Reliance trailer, Serial No. 2631, stalled and stopped; that before they were again started a 1937 Pontiac coupe, California 1940 License No. 45A591, owned and driven by defendant Eugene J. Westphalen and carrying defendant Charles Zanella as a passenger, collided with the rear of said 1929 Reliance trailer, injuring both Eugene J. Westphalen and Charles Zanella and damaging both of the aforesaid 1937 Pontiac Coupe and the said 1929 Reliance trailer driven by defendant Denman R. Curry.

## X.

That an actual controversy exists between plaintiff and [5] each and every defendant herein as follows: Defendants Fred E. Tunzi, Julius Petersen, and Denman R. Curry contend that since the 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631, involved in the aforesaid accident are named and described in the said policy, No. CB34576, plaintiff herein has the obligation under said policy to defend said Fred E. Tunzi, Julius Petersen and Denman R. Curry, or any of them, in any action which may be brought against them, or any of them, because of personal injuries or

property damage suffered by said Eugene J. Westphalen and/or Charles Zanella in said accident; further, defendants Fred E. Tunzi, Julius Petersen and Denman R. Curry, Eugene J. Westphalen and Charles Zanella contend that should it be adjudged in said action or actions that said Fred E. Tunzi, Julius Petersen and Denman R. Curry, or any of them, have any liability to pay any sums to said Eugene J. Westphalen and/or Charles Zanella by reason of the injuries and/or damages incurred in said accident, then plaintiff herein has the obligation, within the limits of said policy No. CB34576, to pay said sums to Eugene J. Westphalen and/or Charles Zanella in satisfaction of such judgments; defendants Eugene J. Westphalen and Charles Zanella further claim that, under the terms of said policy No. CB34576 and the provisions of Section 11580 of the Insurance Code of the State of California, if they, or either of them, secure a judgment or judgments against the said Fred E. Tunzi, Julius Petersen and/or Denman R. Curry, as aforesaid, then the said Eugene J. Westphalen and Charles Zanella, or the one of them securing such judgment, will have a right of action against plaintiff herein on said policy, subject to its terms and limitations; Aetna Casualty and Surety Company, a corporation, claims that defendant Eugene J. Westphalen at the time of said accident was an employee of Davis, Skaggs & Co. of Willits, California; that said Davis, Skaggs & Co. were at said time and are now the insured of said Aetna



Casualty and Surety [6] Company under a policy of workmen's compensation insurance, pursuant to the terms of which said Aetna Casualty and Surety Company has become financially responsible for the care of defendant Eugene J. Westphalen as to workmen's compensation and medical expenses and is subrogated to the rights of its insured under the terms of the Labor Code of the State of California of which alleged subrogation they have duly notified plaintiff herein.

## XI.

Plaintiff herein denies and controverts the contentions, and each of them, of the defendants as set forth in the foregoing paragraph of this complaint, and on its part contends that, although the 1938 Fageol 6 truck and 1929 Reliance trailer involved in the aforesaid accident are named and described in said policy of insurance No. CB34576, plaintiff herein has no obligation or liability under said policy, so far as said accident or the injury or damages arising therefrom are concerned, (1) because at the time of said accident and for several weeks previously thereto the garaging of said 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631 was not at or near Novato, Marin County, California, and for a like period the regular and frequent use of said 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631, was not confined to the territory within 100 miles of Novato, Marin County, California, as provided by the endorsement

to that effect made a part of and issued concurrently with said policy No. CB34576, but on the contrary said truck and trailer were regularly garaged in Napa County, California, and were being regularly used in Napa, Sonoma and Medocino Counties and in making trips more than 100 miles from Novato and in territory where the premium for like liability insurance was much greater than in territory within 100 miles of Novato; (2) for the further reason that at the time of said accident said 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631, were by their owner, [7] Fred E. Tunzi, rented under contract or leased to defendant Denman R. Curry, under which circumstances plaintiff by the express terms of said policy is not liable for loss or damage (see Policy, General Conditions, Paragraph N, subdivision 3); (3) as to defendant Denman R. Curry for the further reason that he is not a named insured or any insured or entitled to coverage under any of the terms of said Policy No. CB34576.

Wherefore, plaintiff prays:

(a) That defendants and each of them be required to answer this bill of complaint in the nature of a petition for a declaratory judgment;

(b) That this Court adjudge, decree and declare the rights and legal relations of the parties under and by reason of that certain policy of automobile liability insurance hereinabove referred to in order that such declaration have the force and effect of a final judgment and decree;

(c) That this Court adjudge and decree that

plaintiff herein has no obligation under said policy of automobile insurance to defend defendants Fred E. Tunzi, Julius Petersen or Denman R. Curry or any of them, in any actions at law which may be brought against them by defendants Eugene J. Westphalen and Charles Zanella, or either of them, or by any other person, because of bodily injuries or property damage suffered by said Eugene J. Westphalen and Charles Zanella because of the accident aforesaid.

(d) That this Court adjudge and decree that plaintiff herein has no liability to any person under said policy of automobile liability insurance by reason of the said accident or the results thereof, (1) because said accident did not happen when the regular and frequent use of the aforesaid 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631, was confined to the territory within 100 miles of Novato, California; (2) because [8] said accident did happen when said 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631, were rented under contract or leased, and (3) because defendant Denman R. Curry is not a named insured or any insured in said policy of automobile liability insurance or entitled to coverage under any provision of said policy.

(e) That this Court grant a preliminary injunction restraining the defendants herein, and each of them, their attorneys, employees, heirs, assigns, representatives, and all other persons concerned or interested therein from taking any proceedings for the purpose of imposing any liability



upon plaintiff herein, whether based upon any bodily injuries or property damages or otherwise, due to or arising from that certain accident aforesaid.

(f) For such other and further relief as may to the Court seem meet and proper in the premises.

CHARLES B. MORRIS  
CARROLL B. CRAWFORD  
Attorneys for Plaintiff.

State of California,  
City and County of San Francisco—ss.

Charles B. Morris, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff and petitioner herein and makes this verification on its behalf for the reason that he is more fully in possession of all the facts and circumstances relating to the matters therein alleged than the said plaintiff and petitioner; that he has read the foregoing Complaint and Petition for Declaratory Judgment and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information and belief [9] and as to those matters he believes it to be true.

CHARLES B. MORRIS.

Subscribed and sworn to before me this 2nd day of May, 1941.

[Seal]                      RAE G. BEHRENS

Notary Public in and for the City and County of  
San Francisco, State of California. [10]

## EXHIBIT A

49-437

Fred E. Tunzi

January 2, 1941

Name of assured is hereby corrected to read:

Fred E. Tunzi and Julius Petersen

Nothing herein contained shall be held to alter, vary or waive any of the agreements, conditions or declarations of either policy, except as herein stated, nor shall this endorsement bind either Company until countersigned by a duly authorized representative of each Company.

This endorsement, when countersigned and attached to Policy, becomes effective on the Second day of January 1941, noon, standard time.

Attached to and forming part of Policy or Policies herein designated, that is to say,

\*Policy No. CB 34576 of The Columbia Fire Insurance Company of Dayton, Ohio, (i.e. Part One of the Combination Policy) and

\*Policy No. CB 34576 of the Bankers Indemnity Insurance Company of Newark, N. J., (i.e. Part Two of the Combination Policy).

---

\*Agents will enter Policy Number in blank space applying to the Company whose policy is affected and rule out the reference to the Company whose policy is Not affected by this endorsement. If Both are affected, repeat the Policy Number in both blank spaces.

Exhibit A (Continued)

Countersigned

L. R. TOBIN,

Authorized Agent.

JOHN T. BEALES,

General Agent.

H. P. JACKSON,

President,

BANKERS INDEMNITY

INSURANCE COMPANY.

PAUL B. SOMMERS,

President,

THE COLUMBIA FIRE

INSURANCE COMPANY.

[Endorsed]: Filed Railroad Commission, Jan.  
3, 1941. [11]

(February 1940)

Description of Use Endorsement—

Commercial Automobiles

(Pacific Coast Territory Only)

For attachment to and forming part of Policy  
No. CB 34576 of the Columbia Fire Ins. Co. &  
Bankers Indemnity Insurance Company.

In consideration of the premium at which the  
Policy designated above is issued, it is warranted  
by the Insured that

Warranty No. 1

Subject to the territorial limitations of such  
Policy, the regular and frequent use of the com-

## Exhibit A (Continued)

mercial type vehicle(s) described in such Policy is and will be confined to the territory within 100 miles of Novato.

## Warranty No. 2

The commercial type vehicle(s) described in such Policy is not and will not be used primarily for the transportation of inflammable liquids having hazard classification equal to or greater than gasoline.

The provisions of this endorsement apply only to commercial automobiles, truck type tractors and commercial trailers and semi-trailers of more than 11½ tons manufacturers' rated load capacity (for hyphenated load capacities the higher capacity will govern).

All other terms and conditions of such Policy remain unchanged.

Countersigned July 11, 1940, at San Francisco, California.

L. R. TOBIN,  
Authorized Agent.  
JOHN T. BEALES,  
General Agent. [12]

Item	Year	Name	Serial No.	Motor No.	P.L.	P.D.
1	1938	Fageol 6	E-729	401943	88.55	40.70
2	1937	Reliance Trailer (20 foot)	37318		44.28	20.35
3	1928	Fageol Diesel	9143	471215	88.55	40.70
4	1929	Reliance Trailer (20 Foot)	2631		44.28	20.35

L. R. TOBIN. [13]

## Exhibit A (Continued)

TERMINATION OF COVERAGE  
ENDORSEMENT

It is agreed that such Public Liability (Bodily Injury Liability) and Property Damage Liability Insurance as is afforded by the policy of which this endorsement is a part shall not terminate or become void for any reason whatsoever, except by the annual expiration of said policy, any statement in the policy or in any endorsement issued in connection therewith to the contrary notwithstanding, until after ten-days' notice thereof in writing shall have been given by the insurer to the Railroad Commission of the State of California at its office in the State Building, San Francisco, California, said period of ten days to commence to run from the date said notice is actually received at said office of the Commission.

It is further agreed that if any policy of which this endorsement forms a part shall be cancelled or otherwise terminated and shall thereafter be reinstated at any time, notice in writing of such reinstatement shall be given by the insurer at the time of issuance thereof to said Railroad Commission at its said office.

It is further agreed by the insurer that the insured is engaged in the business of transporting property for compensation or hire over the public highways in the State of California.

It is further agreed that it is not the intention

## Exhibit A (Continued)

of this endorsement to alter the exclusions of the policy of which it forms a part.

Effective at 12:00 O'clock A.M. of the 1st day of July 1940. Attached to and made a part of Policy No. CB 34576 of the Columbia Fire Insurance Company and Bankers Indemnity Insurance Company issued to Fred E. Tunzi. Countersigned at San Francisco, California. Date of Countersignature July 11, 1940. Countersigned by

L. R. TOBIN,

Authorized Representative.

JOHN T. BEALES,

General Agent.

[Endorsed]: Filed Railroad Commission, July 12, 1940. [14]

---

Combined Automobile Policies  
including  
National Standard Automobile Liability Policy  
(Please Read Them Carefully)

Insured Fred E. Tunzi.

Premium \$387.76.

Expires July 1, 1941.

Car, commercial trucks.

No. C.B. 34576



Exhibit A (Continued)

The Columbia Fire Insurance Company  
of Dayton, Ohio  
and

Bankers Indemnity Insurance Company  
of Newark, N. J.

John T. Beales  
General Agent  
220 Bush Street  
San Francisco, California  
Phone SUTter 7312

541 So. Spring St.,  
Los Angeles, Calif.  
Phone VAndike 3872

Report All Accidents (Claims) Promptly

No. C.B. 34576

Combined Automobile Policies including National  
Standard Automobile Liability Policy

The Columbia Fire Insurance Company  
A Stock Corporation of the City  
of Dayton, Ohio, and

Bankers Indemnity Insurance Company  
A Stock Corporation of the City  
of Newark, New Jersey

(Each Company acting severally and solely in its  
own behalf and not for the other) by the Policies  
hereinafter contained, designated Part One and  
Part Two respectively, whereof the following  
Schedule is a part, do insure as follows:

## Exhibit A (Continued)

## Schedule of Declarations Respectively

## Applying to Each Policy

Section 1. Name of Insured—Fred E. Tunzi.

Address of Insured—Box 89 Star Route, Petaluma, California.

Subject to all the provisions, exclusions, conditions and warranties contained in this policy, loss under The Columbia Fire Insurance Company policy, if any, payable, as interest may appear, to Insured and.....

Address .....

Section 2. Policy Period: From July 1, 1940 to July 1, 1941 12:01 A.M., standard time at the address of the named Insured as stated herein.

Section 3. This insurance is against only such and so many of the Coverages named in the Schedule below as are indicated by a specific premium in writing set opposite thereto. The limit of each Company's liability against each of such Coverages shall be as stated in each policy, subject to all of the terms of this policy having reference thereto.



Part 1—The following Coverages A, B, C, D, E, F, G, H, I, J, K, L, and M, apply to The Columbia Fire Insurance Company Policy.

Item	(For Home Office Use)	Amount of Insurance Rates	Net Premiums
A—Comprehensive (Excluding Collision or Upset) (Coverage A—page 2)		*Not Covered	
B—Fire (Coverage B—page 2)		*Not Covered	
C—Theft (Coverage C—page 2) “Broad Form”		*Not Covered	
D—Theft (Coverage D—page 2) “Deductible Form”		*Not Covered	
E—Tornado and Other Coverages (Coverage E—page 2)		*Not Covered	
F—Collision or Upset (Coverage F—page 2)		*Not Covered	
G—Convertible Collision or Upset (Coverage G—page 2)		*Not Covered	
Subject to the Convertible Additional Payment of \$.....			
H—Breakage of Glass (Coverage H—page 2)		*Not Covered	
I—Flood and Rising Water (Coverage I—page 2)		*Not Covered	
J—Towing and Road Service Expense (Coverage J—page 2)		*Not Covered	
K—Towing and Emergency Service Expense (Coverage K—page 2)		*Not Covered	
L—Special Combined Additional Coverage (Coverage L—page 2)		*Not Covered	
M—Loss of Use by Theft (Coverage M—page 2)		*Not Covered	

No other coverage granted under this Policy except as contained in endorsement or endorsements attached hereto for which the consideration is a premium of.....

Total Premium The Columbia Fire Ins. Co. (Gross) Nil

The Amount of Insurance, in no case exceeding the amount hereinabove stated, is further limited by Endorsement entitled.....if attached hereto, in which case premium credit is entered here.

\*Insert a stated amount of Insurance or the words “Actual Cash Value,” or “Cash Value” Nil

Part 2—The following Coverages, A and B, apply to Bankers Indemnity Insurance Company Policy.

Total Premium Bankers Indemnity Insurance Co.	\$387.76
Total Premium Both Companies	\$

Item a. Insured's occupation or business is Truckman (If married woman, give husband's occupation or business)

c. The description of the automobile and the facts respecting its purchase are as follows:

As per Slip Attached m Md.

Exhibit A (Continued)

Item d. The purposes for which the automobile is to be used are Commercial purposes. (a) The term "pleasure and business" is defined as personal, pleasure, family and business use. (b) The term "commercial" is defined as the transportation or delivery of goods, merchandise or other materials, and uses incidental thereto, in direct connection with the named Insured's business occupation as expressed in Item a. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof.

e. The automobile will be principally garaged and used in the above town, county and state, unless otherwise specified herein Novato, California.

f. The named Insured is the sole owner of the automobile, except as herein stated: No Exceptions.

g. No insurer has canceled any automobile insurance issued to the named Insured, nor declined to issue such insurance, during the past year, except as herein stated: No Exceptions.

h. The automobile described is fully paid for by the Insured, and is not mortgaged or otherwise encumbered, except as follows: No Exceptions; if purchased under conditional sales or lease agreement, state amount unpaid, \$. . . . . represented by . . . . . notes of \$ . . . . . each due monthly, the difference having been paid in cash. Any loss under The Columbia Fire Insurance Company policy issued hereunder that may be proved

## Exhibit A (Continued)

due the Insured shall be payable, as interest may appear to the Insured and.....

Countersigned at San Francisco, California, this 11th day of July 1940.

F. S. TOLIN,

Authorized Agent.

JOHN T. BEALES,

General Agent. [15]

\* \* \* \* \*

Part Two, being the Policy of the Bankers Indemnity Insurance Company of Newark, N. J. (Herein Called the Company).

Does Hereby Agree with the Insured, named in the Declarations made a part hereof, in consideration of the payment of the premium and of the statements contained in the Declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

### Insuring Agreements

I. Coverage A—Bodily Injury Liability—To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage B—Property Damage Liability—To

## Exhibit A (Continued)

pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

II. Defense, Settlement, Supplementary Payments—It is further agreed that as respects insurance afforded by this policy, the Company shall

(a) defend in his name and behalf any suit against the Insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the Insured in any such suit, all expenses incurred by the Company, all interest accruing after entry of judgment until the Company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the Company's liability thereon, and any expense incurred by the



## Exhibit A (Continued)

Insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

The Company agrees to pay the expenses incurred under divisions (a) and (b) of this section in addition to the applicable limit of liability of this policy.

III. Definition of "Insured"—The unqualified word "Insured" wherever used, includes not only the named Insured but also any person while using the automobile and any person or organization legally responsible for the use thereof, provided that the declared and actual use of the automobile is "pleasure and business" or "commercial," each as defined herein, and provided further that the actual use is with the permission of the named Insured. The provisions of this paragraph do not apply:

(a) to any person or organization with respect to any loss against which he has other valid and collectible insurance;

(b) to any person or organization with respect to bodily injury to or death of any person who is a named Insured;

(c) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station, or public parking place, with respect to any accident arising out of the operation thereof:

(d) to any employee of an Insured with respect

## Exhibit A (Continued)

to any action brought against said employee because of bodily injury to or death of another employee of the same Insured injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such Insured.

IV. Automatic Insurance for Newly Acquired Automobiles—If the named Insured who is the owner of the automobile acquires ownership of another automobile, such insurance as is afforded by this policy applies also to such other automobile as of the date of its delivery to him, subject to the following additional conditions: (1) if the Company insures all automobiles owned by the named Insured at the date of such delivery, insurance applies to such other automobile, if it is used for pleasure purposes or in the business of the name Insured as expressed in the Declarations, but only to the extent applicable to all such previously owned automobiles; (2) if the Company does not insure all automobiles owned by the named Insured at the date of such delivery, insurance applies to such other automobile, if it replaces an automobile described in this policy and may be classified for the purpose of use stated in this policy, but only to the extent applicable to the replaced automobile; (3) the insurance afforded by this policy automatically terminates upon the replaced automobile at the date of such delivery; and (4) this agreement does not apply (a) to any loss against which

## Exhibit A (Continued)

the named Insured has other valid and collectible insurance, nor (b) unless the named Insured notifies the Company within ten days following the date of delivery of such other automobile, nor (c) except during the policy period, but if the date of delivery of such other automobile is prior to the effective date of this policy the insurance applies as of the effective date of this policy, nor (d) unless the named Insured pays any additional premium required because of the application of this insurance to such other automobile. [17]

V. Policy Period, Territory, Purposes of Use—This policy applies only to accidents which occur during the policy period, while the automobile is within the United States in North America (exclusive of Alaska) or the Dominion of Canada, or while on a coastwise vessel between ports within said territory, and is owned, maintained and used for the purposes stated as applicable thereto in the Declarations.

## EXCLUSIONS

This policy does not apply:

(a) while the automobile is used in the business of demonstrating or testing, or as a public or livery conveyance, or for carrying persons for a consideration, or while rented under contract or leased, unless such use is specifically declared and described in this policy and premium charged therefor;

(b) while the automobile is used for the towing



Exhibit A (Continued)

of any trailer not covered by like insurance in the Company; or while any trailer covered by this policy is used with any automobile not covered by like insurance in the Company;

(c) while the automobile is operated by any person under the age of fourteen years, or by any person in violation of any state, federal or provincial law as to age applicable to such person or to his occupation, or by any person in any prearranged race or competitive speed test;

(d) to any liability assumed by the Insured under any contract or agreement; or to any accident which occurs after the transfer during the policy period of the interest of the named Insured in the automobile, without the written consent of the Company;

(e) to bodily injury to or death of any employee of the Insured while engaged in the business of the Insured, other than domestic employment, or in the operation, maintenance or repair of the automobile; or to any obligation for which the Insured may be held liable under any workmen's compensation law;

(f) to property owned by, rented to, leased to, in charge of, or transported by the Insured.

CONDITIONS

1. Automobile Defined—Two or More Automobiles—Except where specifically stated to the contrary, the word “automobile” wherever used in this

## Exhibit A (Continued)

policy shall mean the motor vehicle, trailer or semi-trailer described herein; and the word "trailer" shall include semi-trailer. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each but as respects limits of bodily injury liability and property damage liability a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile.

2. Limits of Liability—Coverage A—The limit of bodily injury liability expressed in the Declarations as applicable to "each person" is the limit of the Company's liability for all damages, including damages for care and loss of services, arising out of bodily injury to or death of one person in any one accident; the limit of such liability expressed in the Declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the Company's liability for all damages, including damages for care and loss of services, arising out of bodily injury to or death of two or more persons in any one accident.

3. Limits of Liability—Coverages A and B—The inclusion herein of more than one Insured shall not operate to increase the limits of the Company's liability.

4. Financial Responsibility Laws—Any insurance provided by this policy for bodily injury liability or property damage liability shall conform to the provisions of the motor vehicle financial responsibility

## Exhibit A (Continued)

law of any state or province which shall be applicable with respect to any such liability arising from the use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The Insured agrees to reimburse the Company for any payment made by the Company on account of any accident, claim or suit, involving a breach of the terms of this policy and for any payment the Company would not have been obligated to make under the provisions of this policy except for the agreement contained in this paragraph.

5. Notice of Accident—Claim or Suit—Upon the occurrence of an accident written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the name and address of the injured and of any available witnesses. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

6. Assistance and Cooperation of the Insured—The Insured shall cooperate with the Company and, upon the Company's request, shall attend hearings

## Exhibit A (Continued)

and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits and the Company shall reimburse the Insured for any expense, other than loss of earnings, incurred at the company's request. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident.

7. Action Against Company—No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the conditions hereof, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company, nor in either event unless suit is instituted within two years and one day after the date of such judgment or written agreement.

Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the Insured. Nothing contained in this policy shall give any person or organization any right to join the Company as a co-defendant in any action against the Insured to determine the Insured's liability.

Exhibit A (Continued)

Bankruptcy or insolvency of the Insured shall not relieve the Company of any of its obligations hereunder.

8. Other Insurance—If the named Insured has other insurance against a loss covered by this policy, the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability expressed in the Declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

9. Subrogation—In the event of any payment under this policy, the Company shall be subrogated to all the Insured's rights of recovery therefor and the Insured shall execute all papers required and shall do everything that may be necessary to secure such rights.

10. Changes—No notice to any agent, or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof, signed by the President, a Vice President, Secretary or Treasurer of the Company.

11. Assignment—No assignment of interest under this policy shall bind the Company until its consent is endorsed hereon; if, however, the named Insured shall die or be adjudged bankrupt or in-



## Exhibit A (Continued)

solvent within the policy period, this policy, unless canceled, shall, if written notice be given to the Company within thirty days after the date of such death or adjudication, cover (1) the named Insured's legal representative as the named Insured, and (2) subject otherwise to the provisions of Paragraph III, any person having proper temporary custody of the automobile, as an Insured, until the appointment and qualification of such legal representative, but in no event for a period of more than thirty days after the date of such death or adjudication.

12. Cancellation—This policy may be canceled by the named Insured by mailing written notice to the Company stating when thereafter such cancellation shall be effective, in which case the Company shall, upon demand, refund the excess of premium paid by such Insured above the customary short rate premium for the expired term. This policy may be canceled by the Company by mailing written notice to the named Insured at the address shown in this policy stating when not less than five days thereafter such cancellation shall be effective, and upon demand the Company shall refund the excess of premium paid by such Insured above the pro rata premium for the expired term. The mailing of notice as aforesaid shall be sufficient proof of notice and the insurance under this policy as aforesaid shall end on the effective date and hour of cancellation stated in the notice. Delivery of such written notice either by the named Insured or by the Com-



## Exhibit A (Continued)

pany shall be equivalent to mailing. The Company's check or the check of its representative similarly mailed or delivered shall be a sufficient tender of any refund of premium due to the named Insured. If required by statute in the state where this policy is issued, refund of premium due to the named Insured shall be tendered with notice of cancelation when the policy is canceled by the Company and refund of premium due to the named Insured shall be made upon computation thereof when the policy is canceled by the named Insured.

13. Declarations—By acceptance of this policy the named Insured agrees that the statements in the Declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations, and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance.

In witness whereof, the Bankers Indemnity Insurance Company has caused this policy to be signed by its President and Secretary, but the same shall not be binding unless countersigned by an authorized agent of the Company.

H. P. JACKSON,

President

J. C. MONTGOMERY,

Secretary

[Endorsed]: Railroad Commission. Filed Jul. 12, 1940.

[Endorsed]: Filed May 6, 1941. [18]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS EUGENE J.  
WESTPHALEN AND AETNA CASUALTY  
AND SURETY COMPANY

Defendants Eugene J. Westphalen and Aetna Casualty and Surety Company, a corporation, (without waiving the right of either of them to move for a dismissal of the above-entitled action) do hereby answer the complaint of plaintiff on file herein, and for answer thereto admit, deny and allege as follows, to-wit:

I.

Allege that these defendants and each of them have no information or belief sufficient to enable them to answer the allegations contained in said complaint in Paragraphs I, V, VI, VII, VIII and XI of said complaint, and basing their denials on such want of information or belief deny each and all of the allegations contained in said Paragraphs I, V, VI, VII, VIII and XI, both [19] generally and specifically.

II.

Admit the allegations contained in Paragraphs II, III, IV and IX of said complaint.

III.

Answering the allegations contained in Paragraph X of said complaint, these answering defendants admit the allegations of controversy therein

alleged as to the contentions of these answering defendants, but in this connection these defendants allege that no action for damages resulting from said collision has yet been commenced; allege that as to all other allegations contained in said Paragraph X, these answering defendants have no information or belief, and basing their denials on such want of information or belief deny each and all of the other allegations contained in said Paragraph X, both generally and specifically.

#### IV.

Allege that at the time of said collision at said point four and one-half miles north of said Willits, the said point of collision was less than one hundred air line miles from Novato; allege that these defendants are informed and believe and basing their allegations on such information and belief allege that at the time and place of said collision referred to in said complaint that the truck and trailer therein referred to were then and there operated at said location with the express consent of plaintiff; allege that these defendants are further informed and believe and basing their allegations on such information and belief allege that no notice was given to the Railroad Commission of the State of California within ten days prior to the date of such accident or at any other date prior to the time of said accident that said insurance policy had terminated or become void; allege further on such information and belief that said insurance policy

was at the [20] time of said collision in full force and effect.

V.

These answering defendants each deny each and all of the allegations in said complaint contained which are not hereinabove specifically admitted or specifically denied.

Whereupon, these defendants each pray that said action be dismissed, that plaintiff take nothing herein, that these defendants recover their costs of suit herein expended, and for such other and further order as may be proper in the premises.

CHARLES M. MANNON

IRVING M. BRAZIER

Attorneys for said answering  
defendants.

State of California,  
County of Mendocino—ss.

Irving M. Brazier, being first duly sworn, deposes and says:

That he is an attorney at law duly admitted to practice before the within entitled Court and before all Courts of the State of California, and has his office in Savings Bank Building, City of Ukiah, County of Mendocino, State of California, and is one of the attorneys for defendants appearing by the within entitled answer; that said appearing defendants are each absent from the County of Mendocino, where affiant has his office, and for that rea-

son this verification is not made by said defendants and is made by affiant upon behalf of said defendants and each of them; that affiant has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

IRVING M. BRAZIER

Subscribed and sworn to before me this 21st day of May, 1941.

[Seal]

HILDA B. MANNON

Notary Public in and for the County of Mendocino,  
State of California.

(Receipt of Service.)

[Endorsed]: Filed May 22, 1941. [21]



[Title of District Court and Cause.]

## TEMPORARY INJUNCTION

This cause came on regularly to be heard at this term upon the motion of plaintiff in said cause for a temporary injunction upon plaintiff's verified complaint and Petition for Declaratory Judgment and upon the motion to dismiss of defendants Eugene J. Westphalen, Charles Zanella, and Aetna Casualty and Surety Co., a corporation, and the matter having been argued by counsel for the parties, and it appearing that the issuance of a temporary injunction is necessary to prevent irreparable loss and damage to plaintiff herein and to prevent impairment of the exercise of the court's jurisdiction herein or the enforcement of its orders:

It Is Hereby Ordered, Adjudged and Decreed that a [22] temporary injunction be and the same hereby is granted plaintiff against the defendants above named, and each of them, and their respective agents, servants, assigns and attorneys, and anyone acting by, through or for them, restraining them, and each of them, from taking any further proceedings for any judgment, or judgments, against Fred E. Tunzi, Julius Peterson and Denman R. Curry, or any or either of them, based upon any bodily injuries or property damages or otherwise, due to or arising from that certain collision alleged in plaintiff's said verified complaint and Petition for Declaratory Judgment and from taking any proceedings for the purpose of imposing any liability upon plaintiff herein on account of any judg-



ment or judgments, that may be rendered in consequence of said collision.

It Is Further Ordered that this temporary injunction remain in full force and effect until final hearing and determination of this cause and until further order of this Court.

Dated: July 24, 1941.

A. F. ST. SURE,  
District Judge.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

[Seal]

WALTER B. MALING,  
Clerk, District Court of the  
U. S., Northern district of  
California.

By WM. J. CROSBY,  
Deputy Clerk.

[Endorsed]: Filed July 24, 1941. [23]

---

[Title of District Court and Cause.]

ANSWER OF DEFENDANT FRED E. TUNZI

Defendant, Fred E. Tunzi, does hereby answer the complaint of plaintiff on file herein and for answer thereto, admits, denies and alleges as follows, to-wit:

## I.

Answering the allegations of Paragraph VI commencing with the word "that" on line 3, page 4, and continuing down to and including the word "California" on page 4, line 10, this defendant denies that any of the vehicles described in said allegation were on or about the 8th day of December, 1940, or at any time or at all rented under a contract or leased to defendant, Denman R. Curry.

## II.

Answering the allegations of Paragraph VII of said complaint, this defendant denies each and every, all and singular, generally and specifically the allegations [24] therein contained.

## III.

Answering the allegations of Paragraph VIII, this defendant denies each and every, all and singular, generally and specifically the allegations contained commencing with the word "that" on page 4, line 26, down to and including the word "California" on page 5, line 6; further answering said paragraph this defendant admits that a trip was made from Napa to San Diego for the purpose of hauling basalt bricks but alleges that this trip was made with the knowledge of plaintiff and without any objection on the part of plaintiff; further alleges that any other trips alleged to have been made in said paragraph, if made at all, were made with the knowledge of plaintiff and with the consent of

plaintiff; defendant has no information or belief on the subject of the trips described in the last sentence in Paragraph VIII sufficient to enable him to answer and basing his denial on want of such information or belief, denies each and every, all and singular, generally and specifically the allegations in the last sentence of Paragraph VIII.

#### IV.

Answering the allegations of Paragraph XI commencing with the word "because" on line 17, page 7, down to and including the word "policy" on page 8, line 7, this defendant denies each and every, all and singular, generally and specifically the allegations therein contained.

As and for a Further, Separate and Distinct Defense, This Defendant Alleges:

#### I.

That the place of collision described in the complaint is less than one hundred (100) air line miles from [25] Novato and further alleges that no notice was ever given by plaintiff to the Railroad Commission of the State of California to the effect that the automobile policy issued by plaintiff had terminated or had become void.

Wherefore, this defendant prays that said action be dismissed, that plaintiff take nothing herein, and that this defendant have his costs of suit herein incurred.

Dated: June 19th, 1941.

JOHN B. LOUNIBOS,

LE ROY J. LOUNIBOS,

Attorneys for defendant, Fred  
E. Tunzi, Petaluma, Calif.

(Verification.)

[Endorsed]: Filed Jun. 21, 1941. [26]

---

[Title of Court and Cause.]

ANSWER OF DEFENDANT,  
JULIUS PETERSEN

Defendant, Julius Petersen, does hereby answer the complaint of plaintiff on file herein and for answer thereto, admits, denies and alleges as follows, to-wit:

I.

Answering the allegations of Paragraph VIII this defendant alleges that he has no information or belief on the subject sufficient to enable him to form an answer and basing his denial upon want of information or belief, denies each and every, all and singular, generally and specifically the allegations therein contained.

II.

Answering the allegations of Paragraph IX this defendant alleges that he has no information or belief on the subject sufficient to enable him to form

an answer and basing his denial upon want of information or belief, denies each and every, all and singular, generally and specifically the allegations therein contained.

### III.

Answering the allegations of Paragraph X, this defendant alleges that he has no information or belief on the subject sufficient to enable him to form an answer and basing his denial upon want of information or belief, denies each and every, all and singular, generally and specifically the allegations therein contained. [27]

### IV.

Answering the allegations of Paragraph XI, this defendant alleges that he has no information or belief on the subject sufficient to enable him to form an answer and basing his denial upon want of information or belief, denies each and every, all and singular, generally and specifically the allegations therein contained.

As and for a Further, Separate and Distinct Defense to Plaintiff's Cause of Action, This Defendant Alleges:

### I.

That he has not had any interest in the vehicles described in said complaint and has not had possession of said vehicles at any time subsequent to the middle of December, 1940.

Wherefore, this defendant prays that said action

be dismissed, that plaintiff take nothing herein, and that defendant have his costs of suit herein incurred.

Dated: June 19th, 1941.

JOHN B. LOUNIBOS,  
LE ROY J. LOUNIBOS,

Attorneys for defendant, Julius Petersen, Petaluma, Calif.

(Verification.)

[Endorsed]: Filed June 21, 1941. [28]

---

[Title of District Court and Cause.]

ANSWER OF DEFENDANT,  
DENMAN R. CURRY

Defendant, Denman R. Curry, does hereby answer the complaint of plaintiff on file herein and for answer thereto, admits, denies and alleges as follows, to-wit: [29]

I.

Answering the allegations of Paragraph IV commencing with the word "that", on line 3, page 4, and continuing down to and including the word "California" on page 4, line 10, this defendant denies that any of the vehicles described in said allegation were on or about the 8th day of December, 1940, or at any time, or at all, rented under contract or leased to defendant, Denman R. Curry, by defendant, Fred E. Tunzi, or by any person at all.



## II.

Answering the allegations of Paragraph VII, this defendant denies each and every, all and singular, generally and specifically the allegations therein contained.

## III.

Answering the allegations of Paragraph VIII, this defendant denies each and every, all and singular, generally and specifically the allegations therein contained commencing with the word "that" on page 4, line 26, down to and including the word "California" on page 5, line 6; further answering said paragraph this defendant admits a trip was made from Napa to San Diego for the purpose of hauling basalt rocks but alleges that this trip was made with the knowledge and consent of plaintiff and without any objection on the part of plaintiff; denies that the distances described in said paragraph exclusive of the trip to San Diego were in excess of one hundred (100) air line miles, and further alleges that any other trips described in said paragraph, if made at all, were made with the knowledge and with the consent of plaintiff, and further denies all other allegations in said paragraph not herein specifically denied.

## IV.

Answering the allegations of Paragraph XI, commencing [30] with the word "because" on line 17, page 7, down to and including the word "policy" on page 8, line 7, this defendant denies each and

every, all and singular, generally and specifically the allegations therein contained.

As and for a Further, Separate and Distinct Defense, This Defendant Alleges:

I.

That the place of collision described in the complaint is less than one hundred (100) air line miles from Novato and further alleges that no notice was ever given by plaintiff to the Railroad Commission of the State of California to the effect that the automobile policy issued by plaintiff had terminated or had become void.

Dated: July 10th, 1941.

LE ROY LOUNIBOS,

JOHN B. LOUNIBOS,

Attorneys for defendant, Den-  
man R. Curry, Petaluma,  
California. [31]

State of California,  
County of Sonoma—ss.

John B. Lounibos, being first duly sworn, deposes and says: That he is an attorney at law duly admitted to practice before the within entitled court and before all Courts of the State of California, and has his office in the Realty Building, 32 Washington Street, Petaluma, County of Sonoma, State of California, and is one of the attorneys for the defendant, Denman R. Curry, appearing by the within entitled answer; that said appearing defen-

dant is absent from the County of Sonoma, where affiant has his office, and for that reason this verification is not made by said defendant and is made by affiant upon behalf of said defendant; that affiant has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

JOHN B. LOUNIBOS.

Subscribed and sworn to before me this 10th day of July, 1941.

[Seal]

U. H. TOMASINI,

Notary Public in and for the  
County of Sonoma, State of  
California.

[Endorsed]: Filed July 11, 1941. [32]

---

[Title of District Court and Cause.]

STIPULATION RE ANSWER OF WEST-  
PHALEN AND AETNA CASUALTY AND  
SURETY CO.

It is hereby stipulated that the answer to plaintiff's complaint in the above-entitled action filed by the defendants Eugene J. Westphalen and Aetna Casualty and Surety Company, a corporation, at the time of said defendants filing their motion to dismiss said action, shall be deemed the answer of said defendants and each of them to plaintiff's complaint with the same force and effect as though said answer were served and filed subsequent to the denial of said motion to dismiss, and shall stand

as the answer of said defendants and each of them to said complaint.

Dated: July 19, 1941.

CHARLES B. MORRIS,  
CARROLL B. CRAWFORD,

Attorneys for Plaintiff.

MANNON & BRAZIER,

Attorneys for said defendants

Eugene J. Westphalen and  
Aetna Casualty and Surety  
Company.

[Endorsed]: Filed July 22, 1941. [33]

---

[Title of District Court and Cause.]

ANSWER OF DEFENDANT,  
CHARLES ZANELLA

Now comes Charles Zanella and answering the Complaint of plaintiff herein, admits, alleges, and denies as follows:

1.

Alleges that this defendant has no information or belief sufficient to enable him to answer the allegations contained in said complaint in paragraphs I, V, VI, VII, VIII and XI of said complaint, and basing his denial on such want of information or belief, denies each and all of the allegations [34] contained in said Paragraphs I, V, VI, VII, VIII and XI, both generally and specifically.

2.

Admits the allegations contained in Paragraphs II, III, IV and IX of said complaint.

3.

Answering the allegations contained in Paragraph X of said complaint, this defendant admits the allegations of controversy therein alleged as to the contentions of this defendant, and defendant alleges that as to all other allegations contained in said Paragraph X, this defendant has no information or belief, and basing his denials on such want of information or belief, denies each and all of the the other allegations contained in said Paragraph X, both generally and specifically.

4.

Alleges that at the time of said collision at said point 4½ miles north of said Willits, the said point of collision was less than one hundred air line miles from Novato; alleges that this defendant is informed and believes, and basing his allegations on such information and belief, alleges that at the time and place of said collision referred to in said complaint that the truck and trailer therein referred to were then and there operated at said location by the insured with the express consent of plaintiff; alleges that this defendant is further informed and believes, and basing his allegations on such information and belief, alleges that no notice was given to the Railroad Commission of the State



of California within ten days prior to the date of such accident, or at any other date prior to the time of said accident that said insurance policy had terminated or become void; alleges further on such information and belief that said insurance [34-A] policy was at the time of said collision in full force and effect.

## 5.

This answering defendant denies each and all of the allegations in said complaint contained which are not hereinabove specifically admitted or specifically denied.

Wherefore, this defendant prays that said action be dismissed, that plaintiff take nothing herein, that this defendant recover his costs of suit herein expended, and for such other and further order as may be proper in the premises.

TAFT AND SPURR

HENRY C. SPURR

FRANK W. TAFT [35]

State of California,  
County of Mendocino—ss.

Charles Zanella, being first duly sworn, deposes and says: That he is one of the defendants in the above entitled action; That he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge except as to matters which are therein stated on informa-



tion and belief, and as to those matters that he believes it to be true.

CHARLES ZANELLA

Subscribed and sworn to before me this 28th day of July, 1941.

[Seal]

HENRY C. SPURR,

Notary Public in and for the County of Mendocino,  
State of California.

[Endorsed]: Filed July 30, 1941. [36]

---

[Title of District Court and Cause.]

## MEMORANDUM AND ORDER

Action for declaratory relief. On July 11, 1940, plaintiff insurance company issued to defendant Fred E. Tunzi an insurance policy, covering bodily injury and property damage liability on two trucks and trailers owned by him, which were then in the possession of Julius Peterson at Novato, California. The insured was a highway carrier under permit from the Railroad Commission. The policy was filed with the Commission on July 12, 1940, pursuant to the requirement of the Highway Carriers Act that the carrier procure and continue in effect during the life of the permit adequate protection against liability for personal bodily [37] injuries, and that such protection be not cancellable on less than ten days' written notice to the Railroad Commission. Attached to the policy was a "Termination of Coverage Endorsement" providing in part:

"It is agreed that such Public Liability

(Bodily Injury Liability) and Property Damage Liability Insurance as is afforded by the policy of which this endorsement is a part shall not terminate or become void for any reason whatsoever, except by the annual expiration of said policy, any statement in the policy or in any endorsement issued in connection therewith to the contrary notwithstanding, until after ten-days' notice thereof in writing shall have been given by the insurer to the Railroad Commission of the State of California at its office in the State Building, San Francisco, California, said period of ten days to commence to run from the date said notice is actually received at said office of the Commission. \* \* \*

“It is further agreed that it is not the intention of this endorsement to alter the exclusions of the policy of which it forms a part.”

It was stipulated at the trial that no notice of cancellation was given to the Railroad Commission by the insurer. Plaintiff does not claim that there was a cancellation, but that the policy did not cover the loss under consideration.

The insured expressly warranted that the trucks and trailers would be principally garaged at Novato, California, and that their regular and frequent use would be confined to the territory within 100 miles of Novato. One of the exclusion clauses contained in the policy read as follows: “This

policy does not apply: (a) while the automobile is used in the business of demonstrating or testing, or as a public or livery conveyance, or for carrying persons for a consideration, or while rented under contract or leased, unless such use is specifically declared and described in this policy and premium charged therefor." [38]

About December 8, 1940, defendant Denman R. Curry took possession of one of the trucks and a trailer covered by the policy and moved them to Napa. Defendant Tunzi testified that about this time he told defendant Petersen to notify the insurance company of the removal of the truck and trailer. There is no record that such notification was given. For a period of about five weeks thereafter the truck and trailer were never garaged at or near Novato. At least four trips were made by defendant Curry outside the 100 mile radius of Novato; two to San Diego and two to Mendocino County. Plaintiff contends there were four trips to Mendocino County, but defendant Curry was unable either to deny or verify this contention because of his uncertainty as to the number of trips he made.

On January 14, 1941, while defendant Curry was returning from a trip to Mendocino County, at a point about four and one-half miles north of Willits, which is outside the 100 mile radius of Novato, an accident occurred involving the truck and trailer which he was driving, and a Pontiac coupe in which defendants Westphalen and Zanella were riding.

Plaintiff insurance company claims that it is not liable for any damages for personal injuries and property damage that may be recovered by defendants Westphalen and Zanella, on the grounds that the warranties relating to the principal garaging of the truck and trailer at Novato, and their regular and frequent use within a 100 mile radius of Novato, were breached; and on the further ground that the [39] truck and trailer were rented under contract or leased to defendant Curry at the time of the accident, and were therefore within the exclusion clause of the policy.

The evidence shows that there was a complete disregard and breach of these two warranties from the time defendant Curry took possession of the truck and trailer until the time of the accident. The policy was not intended to cover the uses to which the truck and trailer were put after December 8.

With regard to the applicability of the exclusion clause, the testimony of defendants Tunzi and Curry, who made the arrangements for Curry's use of the truck and trailer, is vague and unsatisfactory. Although Tunzi and Curry were unable to state with any degree of clearness what the arrangement was between them, financial or otherwise, they both said that Curry was to work for Tunzi and to receive "wages", the amount to depend on the amount of hauling he was able to get. However, the subsequent dealings of these defendants are not consistent with the relationship of

master and servant. According to his testimony, Curry did not keep any accurate record of the trips he made, the business he obtained, or the amount he received; and Tunzi testified that he kept no special "track" of the trips except to look occasionally at the mileage of the truck. Tunzi made some advances to Curry and paid for certain repairs to the truck, and these amounts were returned to him by Curry. They had no final accounting. Tunzi did not direct Curry as to the manner of his operations. Curry acted as an independent contractor throughout. The most [40] logical conclusion to be drawn from the evidence is that Curry was to pay as consideration for the use of the truck and trailer a portion of the profits from his hauling business. This manner of payment would not be inconsistent with a contract of rental or hire. The result was that the possession and undirected use of the truck was permitted by the insured to a stranger to the policy, a situation that the plaintiff guarded against in the exclusion clause.

The plaintiff made a *prima facie* case that the truck and trailer were "rented under contract or leased" by offering proof that Tunzi gave Curry temporary possession of them for a period of five weeks and received a profit from their use. Section 1925 of the California Civil Code provides that "Hiring is a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the latter agrees



to return the same to the former at a future time.”

A general and salutary rule of evidence is that the burden of producing evidence should be placed on the party best able to sustain it; that the burden of evidence as to an issue may rest on the party having the greater means of knowledge; and that the court will more readily hold that a party has sustained the burden of evidence where the issue is one as to which the evidence is peculiarly within the adverse party's knowledge or control. 31 C.J.S. §113. Defendants have failed to sustain this burden.

I conclude that the truck and trailer were “rented under contract or leased” at the time of the accident, and were therefore not covered by the policy. It is therefore [41]

Ordered:

1. Plaintiff is entitled to a declaratory judgment that it is not liable to defendants or any of them under said policy of automobile liability insurance;

2. The preliminary injunction will be made permanent.

Plaintiff may submit findings of fact and conclusions of law and judgment in accordance with this memorandum and order.

Dated: June 16, 1942.

A. F. ST. SURE,

United States District Judge

[Endorsed]: Filed June 16, 1942. [42]



[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause came on regularly for trial on the 25th day of March, 1942, before the Court sitting without a jury, Charles B. Morris and Carroll B. Crawford appearing for plaintiff; Lounibos & Lounibos, by John Lounibos, and Bronson, Bronson & McKinnon, by Harold McKinnon, appearing for the defendants Fred E. Tunzi, Julius Petersen, and Denman R. Curry; Mannon & Brazier, by Irving M. Brazier, appearing for the defendants Eugene J. Westphalen and Aetna Casualty and Surety Company, a corporation, and Taft & Spurr, by Frank W. Taft, appearing for [43] the defendant Charles Zanella; and evidence both oral and documentary having been introduced, briefs for plaintiff and defendants having been filed and the cause having been by the Court duly ordered submitted for decision, the Court now makes its findings of fact as follows:

## FINDINGS OF FACT

### I.

That it is true that plaintiff, Bankers Indemnity Insurance Company, was at all times mentioned in the complaint a corporation organized and existing under the laws of the State of New Jersey and duly authorized and licensed to do business within the State of California, and having its principal

place of business within the State of California in the City and County of San Francisco.

## II.

That it is true that at all times mentioned in the complaint defendants Eugene J. Westphalen and Charles Zanella were citizens of the State of California and resided at Willits, Mendocino County, California; that defendant Fred E. Tunzi was a citizen of the State of California and resided at or near Petaluma, Sonoma County, California; that defendant Julius Petersen was a citizen of the State of California and resided at or near Novato, Marin County, California; that defendant Denman R. Curry was a citizen of the State of California and resided at or near Napa, Napa County, California; that defendant Aetna Casualty and Surety Company was a corporation organized and existing under the laws of the State of Connecticut.

## III.

That it is true that the amount in controversy herein exclusive of interest and costs exceeds the sum of Three Thousand Dollars (\$3000.00). [44]

## IV.

That it is true that this suit is brought under and pursuant to the Federal Declaratory Judgment Act (Judicial Code, Section 274d, 28 U. S. C. A., Section 400).

## V.

That it is true that on or about the 11th day of

July, 1940, plaintiff issued a policy of automobile liability insurance numbered CB34576 to defendant Fred E. Tunzi; that the policy period was from July 1, 1940, to July 1, 1941, and said policy was in effect from July 1, 1940, to the date of the complaint herein; that in said policy plaintiff agreed with defendant Fred E. Tunzi to pay on behalf of said Fred E. Tunzi, subject to the limits of liability, exclusions, conditions and other terms of said policy, all sums not exceeding Ten Thousand Dollars (\$10,000.00) for each person and not exceeding Twenty Thousand Dollars (\$20,000.00) for each accident, which defendant Fred E. Tunzi should become obliged to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of service because of bodily injury, and not exceeding Five Thousand Dollars (\$5000.00) because of property damage, sustained by any person or persons caused by accident and arising out of the ownership, maintenance and use of two certain automobiles and two certain trailers described in said policy as (1) 1938 Fageol 6, Serial No. E729, Motor No. 401943; (2) 1937 Reliance Trailer (20 foot) Serial No. 37318; (3) 1928 Fageol Diesel, Serial No. 9143, Motor No. 471215; (4) 1929 Reliance Trailer (20 foot) Serial No. 2631; that said policy provides that said two automobiles and two trailers are to be used for "commercial purposes"; that said policy expressly provides that said automobiles "will be principally garaged and used" in the town of Novato,

California, and further provides that the insurer, plaintiff herein, shall not be liable for loss or damage [45] caused while any automobile involved therein was rented under contract or leased; that by an endorsement appended to said policy and of even date therewith it was specifically provided that in consideration of the premium at which the said policy was issued it was warranted by the insured that, subject to the territorial limitations of said policy, the regular and frequent use of the commercial type vehicles described in such policy "is and will be confined to the territory within 100 miles of Novato"; that the originals of said policy and of said endorsements at the time the complaint herein was filed were on file with the Railroad Commission of the State of California, that a true copy of said policy and said endorsements is attached to the complaint herein, marked "Exhibit A."

## VI.

That it is true that on July 1, 1940, when the aforesaid commercial truck and trailer policy No. CB34576 became effective, the trucks and trailers covered thereby were owned by the insured Fred E. Tunzi, who was the legal and registered owner thereof, but said trucks and trailers were in fact being operated by the defendant Julius Petersen in and around the town of Novato, Marin County, California, and their regular and frequent use was within 100 miles thereof; that on or about the 8th day of December, 1940, the truck designated in the

aforesaid policy No. CB34576 as 1938 Fageol 6, Serial No. E729, Motor No. 401943, and bearing California license 1940 No. BE 14682, and 1929  
PT

Reliance Trailer Serial No. 2631 were returned to their owner, defendant Fred E. Tunzi, and by him hired, rented under contract or leased to defendant Denman R. Curry of Napa, Napa County, California.

## VII.

That it is true that following the hiring, renting under contract or leasing of the said truck and trailer to defendant Denman R. Curry as aforesaid, no alteration or modification was [46] made or requested by the insured in the terms or conditions of said policy No. CB34576, except that on the 2nd day of January, 1941, by a special endorsement made at the request of defendant Fred E. Tunzi, the name of the insured therein was changed by plaintiff to read "Fred E. Tunzi and Julius Petersen"; that said endorsement was filed with the Railroad Commission of the State of California on the 3rd day of January, 1941.

## VIII.

That it is true that after said truck and trailer were by their owner, defendant Fred E. Tunzi, hired, rented under contract or leased to defendant Denman R. Curry on or about the 8th day of December, 1940, said truck and trailer were garaged elsewhere than at Novato, California; that during the period from the 8th day of December, 1940,



to the 14th day of January, 1941, the date of the hereinafter mentioned accident, said truck and trailer were regularly and frequently used in making trips to points more than 100 miles from Novato, to wit, two round trips from Napa, California, to San Diego, California, a distance from Novato of more than 450 air line miles each way, and two round trips or more from Napa, California, to Mendocino and Humboldt Counties, California, a distance from Novato of more than 140 air line miles each way, for the purpose of buying grape stakes, hauling them southward to the vicinity of Napa, California, and selling them.

## IX.

That it is true that while returning southward from Mendocino County on or about the 14th day of January, 1941, at about the hour of 12:30 A. M., while traversing Highway U. S. 101, commonly known as the Redwood Highway, at a point about  $4\frac{1}{2}$  miles north of the town of Willits, Mendocino County, California, said truck and trailer stalled and stopped; that before they were again started a 1937 Pontiac Coupe, California [47] 1940 license No. 45A591, owned and driven by defendant Eugene J. Westphalen and carrying defendant Charles Zanella as a passenger, collided with the rear of said 1929 Reliance Trailer, injuring both Eugene J. Westphalen and Charles Zanella and damaging both the aforesaid 1937 Pontiac Coupe and the said 1929 Reliance Trailer attached to the truck driven by defendant Denman R. Curry.



## X.

That it is true that an actual controversy exists between plaintiff and each and every defendant herein as follows: Defendants Fred E. Tunzi, Julius Petersen and Denman R. Curry contend that since the 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631, involved in the aforesaid accident are named and described in the said policy No. CB34576, plaintiff herein has the obligation under said policy to defend said Fred E. Tunzi, Julius Petersen and Denman R. Curry, or any of them, in any action which may be brought against them, or any of them, because of personal injuries or property damage suffered by said Eugene J. Westphalen and/or Charles Zanella in said accident; further, that defendants Fred E. Tunzi, Julius Petersen, Denman R. Curry, Eugene J. Westphalen and Charles Zanella contend that should it be adjudged in said action or actions that said Fred E. Tunzi, Julius Petersen and Denman R. Curry, or any of them, have any liability to pay any sums to said Eugene J. Westphalen and/or Charles Zanella by reason of the injuries or damages incurred in said accident, then plaintiff herein has the obligation, within the limits of said policy No. CB34576, to pay said sums to Eugene J. Westphalen and/or Charles Zanella in satisfaction of said judgments; that defendants Eugene J. Westphalen and Charles Zanella further claim that under the terms of said policy No. CB34576 and the provisions of Section 11580 of the Insurance Code of the State of Cali-

fornia, if they, or either of them, secure a judgment or judgments against the said Fred E. [48] Tunzi, Julius Petersen and/or Denman R. Curry, as aforesaid, then the said Eugene J. Westphalen and Charles Zanella, or the one of them securing said judgment, will have a right of action against plaintiff herein on said policy, subject to its terms and limitations; that defendant Aetna Casualty and Surety Company, a corporation, claims that defendant Eugene J. Westphalen, at the time of said accident, was an employee of Davis, Skaggs & Co., of Willits, California; that said Davis, Skaggs & Co., were at said time the insured of said Aetna Casualty and Surety Company under a policy of workman's compensation insurance pursuant to the terms of which said Aetna Casualty and Surety Company has become financially responsible for the case of defendant Eugene J. Westphalen as to workman's compensation and medical expenses and is subrogated to the rights of its insured under the terms of the Labor Code of the State of California, of which alleged subrogation defendant Aetna Casualty and Surety Company has duly notified plaintiff herein.

## XI.

That it is true that at the time of said accident and for several weeks previously thereto the garaging of the aforesaid truck and trailer was not at or near Novato, Marin County, California, and for a like period the regular and frequent use of said truck and trailer was not confined to the territory

within 100 miles of Novato, as provided by an endorsement to that effect made a part of and issued concurrently with said policy No. CB34576, but on the contrary during the period beginning December 8, 1940, and ending on the date of the accident, January 14, 1941, said truck and trailer were garaged elsewhere than at Novato and were being regularly and frequently used in making trips of more than 100 air line miles from Novato and into territory so far distant therefrom that the premium for like automobile liability insurance was greater than if the operation [49] of said truck and trailer had been confined to territory within 100 miles of Novato.

## XII.

That it is true that the place of the collision or accident described in the complaint is more than 100 air line miles from Novato.

## XIII.

That it is true that at the time of the collision or accident described in the complaint said truck and trailer were by their owner, defendant Fred E. Tunzi, hired, rented under contract or leased to defendant Denman R. Curry.

## XIV.

That it is not true that at any time mentioned in the complaint defendant Denman R. Curry was an employee of defendant Fred E. Tunzi.

## XV.

That it is not true that at the time and place of

the accident referred to in the complaint said truck and trailer were operated at said location with the consent of plaintiff.

#### XVI.

That it is not true that the trips, or any of them, made by defendant Denman R. Curry with the aforesaid truck and trailer more than 100 miles from Novato, or any other trips made with said truck and trailer by defendant Denman R. Curry, were made with the knowledge and/or consent of plaintiff.

#### XVII.

That it is true that no notice of cancellation of policy No. CB34576 was ever given by plaintiff to the Railroad Commission of the State of California; that plaintiff does not claim that there was a cancellation, but claims that said policy does not cover the loss under consideration. [50]

#### XVIII.

That a declaratory judgment herein is proper and necessary to determine the legal rights and obligations of the respective parties hereto.

### CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts the Court finds:

#### I.

That this Court has jurisdiction under the Federal Declaratory Judgment Act (Judicial Code,

Section 274d, 28 U.S.C.A., Section 400) to entertain this suit.

II.

That said truck and trailer at the time of the accident in question were not covered by the said policy of automobile liability insurance No. CB34576.

III.

That plaintiff is entitled to a declaratory judgment that it is not liable to defendants or to any of them under the terms of said policy of automobile liability insurance No. CB34576 for any injuries or damages caused by or arising from that certain accident or collision involving 1938 Fageol 6 truck, Serial No. E729, and 1929 Reliance trailer, Serial No. 2631, owned by defendant Fred E. Tunzi and operated by defendant Denman R. Curry, and 1937 Pontiac Coupe, California 1940 license No. 45A591, owned and operated by defendant Eugene J. Westphalen, which occurred on the 14th day of January, 1941, on Highway U. S. 101, about 4½ miles north of Willits, Mendocino County, California.

IV.

That the preliminary injunction now in force herein was properly allowed by this Court and will be made permanent. [51]

V.

That plaintiff recover its costs of suit herein.

Let judgment be entered accordingly.



Dated, Aug. 4, 1942.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Aug. 4, 1942. [52]

---

In the Southern Division of the United States District Court, in and for the Northern District of California.

No. 21865-S

BANKERS INDEMNITY INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

EUGENE J. WESTPHALEN, CHARLES ZANELLA, FRED E. TUNZI, JULIUS PETERSEN, DENMAN R. CURRY, AETNA CASUALTY AND SURETY COMPANY, a corporation,

Defendants.

### JUDGMENT AND DECREE

This cause having come on regularly for trial on the 25th day of March, 1942, before the Hon. A. F. St. Sure, without a jury, Charles B. Morris and Carroll B. Crawford appearing as attorneys for plaintiff; Lounibos & Lounibos, by John Lounibos, and Bronson, Bronson & McKinnon, by Harold McKinnon, appearing for defendants Fred E.



Tunzi, Julius Petersen and Denman R. Curry; Mannon & Brazier, by Irvin M. Brazier, appearing for defendants Eugene J. Westphalen and Aetna Casualty and Surety Company, a corporation, and Taft & Spurr, by Frank W. Taft, appearing for [53] defendant Charles Zanella; oral and documentary evidence on behalf of the respective parties having been introduced, plaintiff and defendants having rested, and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having rendered its decision and filed its findings of fact and conclusions of law and ordered that judgment be entered in accordance with said findings;

It is by the Court hereby Ordered, Adjudged and Decreed:

1. That this Court has jurisdiction under the Federal Declaratory Judgment Act (Judicial Code, Section 274d, 28 U.S.C.A., Section 400) to entertain this suit.

2. That said truck and trailer at the time of the accident in question were not covered by said policy of automobile liability insurance No. CB34576.

3. That plaintiff is not liable to defendants, or to any of them, under the terms of said policy of automobile liability insurance No. CB34576 for any injuries or damages caused by or arising from that certain accident or collision involving 1938 Fageol 6 truck, Serial No. E729 and 1929 Reliance trailer, Serial No. 2631, owned by defendant Fred E. Tunzi and operated by defendant Denman R. Curry, and 1937 Pontiac Coupe, California license No. 45A591,

owned and operated by defendant Eugene J. Westphalen, which occurred on the 14th day of January, 1941, on Highway U. S. 101 about 4½ miles north of Willits, Mendocino County, California.

4. That the preliminary injunction now in force herein was properly allowed by this Court and is hereby made permanent.

5. That plaintiff recover its costs of suit herein, taxed at the sum of \$.....

Dated, Aug. 4, 1942.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Aug. 4, 1942. [54]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Wednesday, March 25, 1942

Counsel Appearing:

For Plaintiff:

Charles B. Morris, Esq.,  
Carroll B. Crawford, Esq.

For Defendant Charles Zanella:

F. W. Taft, Esq.

For Defendants Denman R. Curry, Julius Petersen  
and Fred E. Tunzi:

John Lounibos, Esq.,  
Harold McKinnon, Esq.

For Defendants Eugene J. Westphalen and Aetna  
Casualty and Surety Company:

Irving M. Brazier, Esq.

---

FRED E. TUNZI,

Called for the Plaintiff; sworn.

Mr. Morris: Q. Mr. Tunzi, you were the owner  
of the automobile equipment insured under the  
Bankers Indemnity Insurance Company's policy?

A. Yes. [57]

Q. Described in the complaint, here?

A. Yes.

Q. And who was using that equipment at that  
time? A. From the beginning?

(Testimony of Fred E. Tunzi.)

Q. From July 1, 1940.

A. Julius Petersen.

Q. Where does Mr. Petersen reside?

A. At Novato.

Q. And who secured this insurance on the equipment?  
A. Mr. Petersen.

Q. Mr. Petersen secured it? A. Yes.

Q. Do you know what Mr. Petersen was using that equipment for?  
A. Yes.

Q. What was he using it for?

A. For hauling different commodities.

The Court: Name some of them.

A. Hay and feed.

Mr. Morris: Q. Do you know where he was using it, in what vicinity?

A. Well, in the vicinity of Novato.

Q. Now, did he continue to use that equipment for some period of time following July 1?

A. Yes.

Q. How long did he use it?

A. Up to December, sometime.

Q. Well, what time in December?

A. The first part of December.

Q. What happened to it then?

A. Well, it was idle at the time, did not have any more use for it.

The Court: Q. Then what happened?

A. Mr. Curry came along, and he wanted a job, and wanted to run the truck, wanted to use the truck.

(Testimony of Fred E. Tunzi.)

Mr. Morris: Q. About when was this Mr. Curry came along?

A. It was about the first week in December, I imagine.

The Court: Q. The first week in December?

A. Yes.

Mr. Morris: Q. Did you know Mr. Curry before that? A. Yes.

Q. What was the occasion of you and Mr. Curry meeting around the 1st of December?

A. I imagine he was out of work, and he knew I [58] had the truck, and being a truck driver he came to me in order to get something to do.

The Court: Q. What did he say to you and what did you say to him?

A. I, having a truck idle, I said, "I have got a truck."

Q. Mr. Curry came to you, did he?

A. Yes.

Q. What did he say?

A. He said he wanted to run my truck for me.

Q. I do not expect you to remember the exact words, but just give me the substance of what Mr. Curry said to you, and what you said to him. You say you knew Mr. Curry? A. Yes.

Q. And you had a truck which was not being used, and Mr. Curry called upon you, is that correct? A. Yes.

Q. Then what did Curry say, to the best of your recollection?

(Testimony of Fred E. Tunzi.)

A. Well, he wanted to run the truck.

Q. No, what did he say? You say he wanted to run the truck. Did he say, "I want to run your truck," or did he say, "Have you got a truck I can use," or "I want to buy your truck," or anything of that kind?

A. No, he did not say that, he said he wanted to run the truck and make money for me.

Q. Did he say he would like to run the truck and make money for you? A. Yes.

Q. You think that is what he said?

A. Yes.

Q. What did you say?

A. Well, I said I would give him a trial, I had a truck that was idle.

Q. What arrangements, if any, did you make with Mr. Curry?

A. Well, we went right down—in a few days we decided on the day, and we went down to see Mr. Petersen, and to talk it over with Mr. Petersen, and he took the truck and started off to—he had some work that he was going to take care of. [59]

Q. Who was that? A. Mr. Curry.

Q. You talked it over with Petersen. What was said when you talked it over with Petersen, what did you say, what did Curry say, and what did Petersen say? A. I told him——

Q. Told who?

A. Mr. Petersen, that I was going to split the trucks, having two, I was going to split them up



(Testimony of Fred E. Tunzi.)

and give Mr. Curry one, so I could keep them working.

Q. Then what did Petersen say?

A. He said it was perfectly all right.

Q. Anything further said?

A. Well, I told him to notify the insurance company.

Q. Told who?

A. Mr. Petersen, to notify the insurance company of the truck being moved to Napa.

Q. Anything else that you remember?

A. Not in particular.

Q. What did you do after that?

A. Well, he took the truck.

Q. Who took the truck?

A. Mr. Curry took the truck, and went on his way, and I went on home.

The Court: Go ahead, Mr. Morris.

Mr. Morris: Q. When Mr. Curry came to you, where did he see you, what place did he come to, your home? A. Yes.

Q. Did he say anything to you at that time about wanting to buy a truck?

A. Well, not exactly.

Q. You say "not exactly," what did he say about buying a truck?

A. The idea was, there was quite a sum involved in the truck, and he could not buy it, and I knew his circumstances, that he was a truck driver, and he was driving trucks, and that is as far as I talked to him.

(Testimony of Fred E. Tunzi.)

Q. Did he ask you to finance him on the truck?

A. No, I had so much in financing before that, that he wanted to drive, he particularly wanted to drive the truck to make money for me. He [60] knew the setup I had with Petersen.

Q. What did he say about getting possession of these trucks, what proposition did he make to you?

A. He was going to drive the truck and turn everything over to me, you see.

Q. Turn over what to you?

A. Give the shipping orders in my name.

Q. Well, had you shipping orders at the time that he came to you?

A. I got them, I instructed him to get the shipping orders and make them out, because it was through the Railroad Commission and the Board of Equalization, and Petersen instructed us to have those job orders.

The Court: Q. Petersen instructed you what?

A. As to those shipping orders, that we had to have for our records.

Mr. Morris: Q. Did you have any shipping orders at the time that Curry came to you?

A. No.

Q. What shipping orders did you get after Mr. Curry came to you?

A. I think he got them through Mr. Petersen. I got the bills after they were made out by Curry.

Q. Shipping orders for what?

(Testimony of Fred E. Tunzi.)

A. For basaltite material that he was hauling from Napa.

Q. Who got those shipping orders?

A. Mr. Curry made them out.

Q. And that hauling of basaltite rock was to what point?

A. Well, it was to San Diego, or Los Angeles, and Redwood City.

Q. Did Mr. Curry, when he first came to you, tell you that he had an opportunity to haul some basaltite material?

A. Yes.

Q. To Southern California?

A. Yes.

Q. He wanted to buy a truck?

A. He did not say "buy."

Q. What did he say?

A. He said he wanted to run them for me.

Q. He wanted to run the trucks for you?

A. Yes.

Q. And what were you to get out of running the trucks? [61]

A. Well, we never said—I said, "I will give you so much for your work."

Q. How much did you say you would give him?

A. We never set no figure. He was willing to take according to what he could do.

Q. He was going to take the trucks and work them for what he could make out of them: was that your understanding?

A. No, run them for me, and he was going to drive the truck and get the business.

(Testimony of Fred E. Tunzi.)

Q. He was going to get the business?

A. Yes.

Q. And operate your trucks? A. Yes.

Q. How much were you going to get out of it?

A. I was going to get everything except to pay him for his time.

Q. Did you agree on what his time was?

A. No, I did not.

Q. Wasn't the understanding with Mr. Curry that you would go 50/50 on it, after the expenses were deducted?

A. No, we did not say that.

Q. You were going to divide the profits, wasn't that your understanding?

A. We didn't go into just how much, but I said, "You will get your wages," that is what I told him then.

Q. Were you going to guarantee him his wages, whether he made them or not?

A. According to what he made.

The Court: Q. Just what was the arrangement you had? You are very indefinite about it. I would like to know the facts. What was the arrangement you had with Curry?

A. He was going to give them a trial to see how much hauling he could do, and turn it over to me.

Q. What did you agree to pay Curry, if anything? A. I did not agree.

Q. What did you ever pay Curry, if anything?

(Testimony of Fred E. Tunzi.)

A. I gave him some money to start off, I think, I did not give him much.

Q. How much did you give him?

A. I gave him \$5 the first time. [62]

Q. This was your truck? A. Yes.

Q. And you were willing to turn it over to him on that sort of an understanding? A. Yes.

Q. And the only money you paid him was \$5?

A. When he started off.

Q. How much have you received?

A. But I paid all of the expenses to keep the truck in shape so that it would run.

Q. You had the trucks fixed up before you turned them over to him?

A. Yes, put in quite a bit of expense to get them in good shape.

Q. To have them repaired? A. Yes.

Q. Did you have more than one truck repaired?

A. At that time I just had the trailer repaired, more work done on the trailer.

Q. And you turned over the truck and trailer to him? A. Yes.

Q. And you paid him \$5, that is all you ever paid him, and he started work with your truck?

A. Yes.

Q. What did he do?

A. He went and got this hauling of basalite rock.

Q. How much rock did he haul?

A. Well, they sent me a check for \$310 after

(Testimony of Fred E. Tunzi.)

about thirty days.

Q. How many trips did he make to San Diego?

A. Two.

Q. Was that all?

A. That is all I know of. That is all I have bills for.

Q. You have bills for two trips to San Diego, and you received \$310 for that, is that right?

A. Not for the two trips, there were several other trips besides.

Q. What were the other trips?

A. Redwood City.

Q. Redwood City, and what other place?

A. And Davis, I think he made two trips to Davis.

Q. How many trips to Redwood City?

A. One. [63]

Q. One trip to Redwood City, and two trips to San Diego, is that right? A. Yes.

Q. And for all of those trips you received \$310, is that right? A. Yes.

Q. How much did you pay Curry?

A. I did not pay him, I gave him \$25 for those trips.

Q. Is that all you gave Curry, \$5 and \$25, a total of \$30, is that right? A. Yes.

Q. How long did he have the trucks—how long did Curry have the trucks?

A. About two months.

The Court: Anything further?



(Testimony of Fred E. Tunzi.)

Mr. Morris: Q. Did Mr. Curry collect some money that he kept, himself, that he did not turn over to you? A. Yes.

Q. That was for hauling and using these trucks?

A. Yes.

Q. Do you know how much that was that he kept?

A. We never figured the account of hauling these grape stakes, I gave him \$25 to help to buy some grape stakes, and he had other money of mine that he bought grape stakes that he collected.

Q. Then the money, other than this \$30, is money that he earned with these trucks and he kept?

A. We never settled our account on account of this suit, I imagine; he never came around to straighten out the final account. He did pay me one time \$125, I think \$125, I am not sure of the exact amount, but he wrote me a check the day he brought the truck in to Petaluma; the check was over \$100 that he turned in on hauling.

Q. Now, you say that on the day you had the conversation with Petersen and Mr. Curry you turned over this truck and trailer to Mr. Curry?

A. Yes.

Q. And he drove it up to Napa? A. Yes.

Q. When was it you had the repairs made?

A. I am not certain if [64] it was right away, or it was a little later that we had the repairs.

Q. He continued on to use it, then, before you had any repairs made?

(Testimony of Fred E. Tunzi.)

A. Yes, for a few trips, I imagine.

Q. Who paid for those repairs? A. I did.

Q. Did that come out of the receipts that Curry took in for the hauling?

A. No, I paid it out of my own account.

Q. You never had any accounting with Curry on that? A. No, we never settled.

Q. You don't know how much Mr. Curry took in while he was using these trucks for the two months? A. Not accurately.

The Court: Q. About how much?

A. Well, say, \$700.

Q. \$700? A. \$600 or \$700.

Q. \$600 or \$700. Did you keep account of it?

Mr. Lounibos: Yes, we have his books here.

The Court: Perhaps you can refresh his memory on it.

Mr. Lounibos: This record was subpoenaed.

Mr. Morris: Q. Mr. Tunzi, this is a book marked "Denman R. Curry, Truck Account." Was this book kept by you or Mr. Curry?

A. Mr. Curry kept the items; he turned the book over to me to show what he paid out, and I used it for my own records, I have some of my own records in there since then.

Q. Was this book kept by you or Mr. Curry?

A. He kept it to begin with, and after he turned it over to show what expenses he had, I kept it since.

The Court: Q. Does it show the amount of money that Curry turned over to you?

(Testimony of Fred E. Tunzi.)

A. It shows my record of what he paid me.

Mr. Morris: Will you tell what Curry paid you?

A. There was a check from basalite rock for \$310.01, and finally there was \$125, I am not exact on it, it might have been \$135, somewhere [65] in that neighborhood, I did not put it down right away; that is what I received.

Q. From Mr. Curry? A. Yes.

Q. But does this book show how much Mr. Curry took in, altogether, while he was using these trucks?

A. No, it don't.

The Court: As I understand it, this is the account, here. On page 6 there is written in lead pencil, "Received from D. R. Curry."

A. That is what I got from Mr. Curry.

Q. Is this your handwriting? A. Yes.

Q. Basalt rock \$310.01, D. Curry, \$125, Cash received \$435.01. Is that all you got from Curry?

A. That is all.

Q. That is all the cash you got from Curry?

A. That is all the cash.

Q. In the two months? A. Yes.

Q. I thought you said a little while ago that Curry collected \$600 or \$700.

A. I don't know how much he collected, but the total I paid out was \$772.

Q. You paid out \$772? A. Yes.

Q. Whom did you pay that to?

A. I paid Curry, and the trailer company for the repairs on the Reliance trailer after the wreck.

(Testimony of Fred E. Tunzi.)

Q. After the wreck? A. Yes.

Q. What did you pay to Curry?

A. I paid Curry \$25 and \$100.

Q. \$25 and \$100? A. And the \$5 cash.

Q. And \$5 cash? A. Yes.

Q. The total amount of cash you paid Curry was \$130, is that right? A. Yes.

Q. That is all you paid him during the two months? A. That is all.

Q. All he gave you, then, as I understand it, was \$435.01: is that correct? A. Yes. [66]

Q. That is all the money you got out of it?

A. Yes.

Q. What about this statement that you made, that Curry took in \$600 or \$700 in two months?

A. On these grape stakes, I don't know, I never settled the account, I don't know how much he took in, altogether, because he never wound up the account, he never made a final settlement.

Q. There was never a final settlement made between you? A. No.

Q. And you don't know how much he did take in? A. No.

Q. He did not give you any of that money?

A. No.

Q. On the grape stakes, he did not get anything, at all, for that?

A. I got this \$125, it must have come from the grape stakes, some part of it.

Q. The \$125, you think, is from the grape stakes,

(Testimony of Fred E. Tunzi.)

and there was \$310.01 from the Basalt Rock Company?      A. Yes.

Mr. Morris: Q. You paid the repair bills on the truck; that is, part of this money you speak of was repairs on the truck?      A. Yes.

Q. When did Mr. Curry start hauling grape stakes?

A. I don't know the exact date, but it was after the basalt job.

Q. Do you know about when it was he started to hauling grape stakes?

A. No, I don't, exactly.

Q. Do you know where he was hauling these grape stakes from, what place?

A. I don't know.

Q. Mr. Curry was using his truck and trailer as he saw fit, isn't that correct?      A. Correct.

Q. You were not keeping any record of his movements, at all?

A. Every time I would see him I would kind of check down on the mileage just to get an idea.

Q. Of what he was doing?      A. Yes.

Q. But you did not keep any track of any particular trips he made, or where he made them?

A. No. [67]

Q. Nor what he was hauling?      A. No.

Q. So, you don't know, then, of your own knowledge, what trips he made for grape stakes?

A. No, I do not.

Q. You never had any accounting with him as



(Testimony of Fred E. Tunzi.)

to how much money he made hauling grape stakes, had you?      A. No.

The Court: Q. Do you know where he got the grape stakes, where he was purchasing them, if he did purchase them?

A. He told me that he was going up to Mendocino County and hauling grape stakes for the ranches, and I gave him \$25 in order to have enough money to finance purchasing grape stakes.

Q. Where was he to take the grape stakes?

A. To the ranchers around Napa, I presume.

Q. He was going up to Mendocino County and getting them, is that right?      A. Yes.

The Court: Is that all?

Mr. Morris: Q. You don't know the people whom he purchased them from, or anything of that kind?      A. No.

Mr. Morris: That is all.

Mr. Lounibos: No questions.

#### Cross-Examination

Mr. Brazier: Q. Mr. Tunzi, all of these arrangements that you had with Mr. Curry were oral, were they not?      A. Yes.

Q. Nothing in writing?      A. Nothing.

Q. Did the Bankers Indemnity Insurance Company give you any notice of cancellation or termination of this insurance policy?      A. No.

Mr. Brazier: That is all. [68]



JOHN R. ANDERSON,

Called for the Plaintiff; sworn.

Mr. Morris: Q. Mr. Anderson, what is your business?

A. I am office manager of the Basalt Rock Company, Inc.

Q. Do you know Denman R. Curry?

A. Yes, I met him on two or three occasions.

Q. What connection, if any, did he have with the Baselite Rock Company?

A. He hauled some of our material.

Q. Do you know with whom that arrangement was made?

A. No, possibly with Mr. Kay. I just handled the accounts in the office.

Q. You just handle the accounts in the office?

A. Yes.

Q. Did you have an account in the office with Denman R. Curry?

A. I have an account here, the account, here, is under the name of D. R. Curry.

Q. Did he do some hauling for you?

A. Yes.

The Court: Q. Is that a ledger sheet?

A. Yes.

Q. Is that the original ledger sheet?

A. Yes.

Q. What does it show?

A. The name is D. R. Curry, and December 13, 1940, Cash payment \$100.

Mr. Morris: Q. What is that payment for?

(Testimony of John R. Anderson.)

A. Our voucher is attached to the check and reads, "Advance on account F. E. Tunzi," I believe it is. That check was payable to Mr. Curry, however. As I remember——

Q. (Interrupting): Tell us what you remember about that.

A. As I remember, before he made the trip to San Diego, I think he came in and wanted some money, he did not have enough money, and wanted some money before he left, it was quite a ways from home, and that was advanced.

Q. \$100 cash was advanced? A. Yes.

Q. Any further payment made to him?

A. In January we closed the [69] account with a check of \$310.01.

Q. \$310.01?

A. Yes, that check was payable to F. E. Tunzi.

Q. Do you know who got that check, whether it was given to Mr. Tunzi or Mr. Curry?

A. I don't know who picked it up at the office, no.

Q. You say the account was in the name of Denman R. Curry? A. D. R. Curry.

Q. What was the connection of Tunzi with the Curry account?

A. Well, as I remember, at the time Mr. Curry came in to get this \$100 advance I went down to the office with him, I am pretty careful, usually, about giving an advance, and he either had an agreement with Mr. Tunzi or was buying the truck—I

(Testimony of John R. Anderson.)

do not remember that he told me that Mr. Tunzi still retained the title to it, and that is the reason I wrote on the voucher "Advance on Tunzi account"; in other words, we were trying to protect our interests. On this I might add there was also a \$7.37 deduction, which was to be deducted.

Q. That was to be deducted?

A. In other words, the total of the hauling was \$417.38.

Q. The check for \$310.01 was made out in Tunzi's name?           A. Yes.

Q. And \$100 cash was paid to Curry?

A. To Curry.

Q. Are those all of the items in the account?

A. That is the two items, and then \$7.37, which is deducted from the final payment.

Q. What payment did you deduct it from?

A. Actually, we did not deduct it from the payment; we entered it in the account as a charge for fuel that we furnished the truck, there. I remember then we made a check up for \$310.01, and that closed the account up, after we had charged that \$7.37.

Q. What was the date of that?

A. December 31. That is opposite that date; that means that would cover any trips he had made during [70] the month of December.

The Court: Q. You gave him \$100 cash on December 13?

A. That is right, but under the practice fol-

(Testimony of John R. Anderson.)

lowed we only entered it once a month, and entered it at the end of the month, and it covered all trips during the month.

Mr. Morris: Q. There is no other account subsequent to December 31?

A. This is the entire account.

The Court: Q. Do you know how many trips he made?

A. I do not have that information with me.

Q. More than one?

A. Yes, more than one. It would have to be several trips to make up that amount of money.

Q. Do you know how much rock was involved?

A. I do not believe he hauled rock, I think that he hauled some material to San Diego, and it is possible that he hauled cement from Redwood City.

Q. From Redwood City? A. Yes.

Mr. Morris: I would like to offer that sheet in evidence.

The Court: This is your original ledger sheet, I suppose? A. Yes.

Q. Have you got a copy?

A. No, I have not a copy.

The Court: I do not think you need it in the record. He has read in the items, so I do not think you need it.

Mr. Morris: All right, that is all.

#### Cross-Examination

Mr. Lounibos: Q. Did you have any conversation with the defendant, F. E. Tunzi, in connection with this transaction?

(Testimony of John R. Anderson.)

A. I do not recall any.

Q. You had never seen Mr. Tunzi up to to-day?

A. I had never known him until he took the stand.

The Court: Q. Your dealings were entirely with Curry? A. Yes. [71]

Q. Did you give the \$310 check to Curry?

A. I could not answer that, we have too many checks go out.

Mr. Lounibos: Q. The check was payable, however, to F. E. Tunzi? A. That is right.

Q. There was deducted before you closed out that account this item of \$7.37? A. Yes.

Q. That is a charge to Tunzi's balance?

A. That was charged in this account.

Q. You would not know anything about the various trips Mr. Curry made, would you, other than what has already been stated?

A. I did not look the records up.

Q. You would not know whether he made two trips to Redwood City for the Baselite Rock Company?

A. No; however, I know for this amount of money he had to make several trips, and I am quite sure, I know when he got the advance he wanted to go to San Diego, and I imagine he made more than one trip to San Diego.

Q. Do you recall, or do you know that he made any trips to Dixon, or Davis?

A. I do not recall.



J. W. KAY,

Called for the Plaintiff; sworn.

Mr. Morris: Q. What is your business, Mr. Kay?

A. I am superintendent of the Basalite Department of the Basalt Rock Company, Inc.

Q. Do you know Denman R. Curry?

A. Yes, I know the gentleman.

Q. How long have you known Mr. Curry?

A. About two years.

Q. Do you know what his business was during that two years?

A. To the best of my knowledge he was a truck driver.

Q. Referring now to the month of December, 1940, you knew Mr. Curry at that time, did you?

A. Absolutely. [72]

Q. And what was your contact with him at that time?

A. Well, we were making shipments of a large consignment of goods at San Diego by truck on a Government project, and there was a hurry, and they wanted delivery as soon as possible, or as fast as possible, and Mr. Curry came into the plant one day and propositioned me about hauling some of the material, and I told him that the job was his if he could get a truck, if he could handle it, and he said he believed he could, and in a day or two he came back and said he had made arrangements for a truck and trailer, and that he would be in the next day or so to take a consignment of goods out.



(Testimony of J. W. Kay)

The Court: Q. How many trips did he make to San Diego?

A. To the best of my knowledge it was two trips.

Q. Did he make any other trips that you know of?

A. It seems to me that he made a trip for a load of cement to Redwood City, and then he made one or two trips over toward Davis.

Q. What was that for?

A. That was for basalite.

Q. Two trips to Davis carrying Basalite?

A. Yes.

Q. Any other trips?

A. No, I think there were about five trips involved, all told.

Q. Altogether?

A. Yes, I think there were about five.

Q. That was the extent of your business with him?

A. Correct.

Mr. Morris: Q. Mr. Kay, do you know where Mr. Curry got this truck and trailer?

A. Well, I understood that he got it from a gentleman by the name of Tunzi, that lived over toward Petaluma.

Q. Did you have any dealings with Mr. Tunzi?

A. None, whatever.

Q. Your agreement for this hauling was with Mr. Curry?

A. With Mr. Curry, correct. [73]

Q. And all of the contacts that you had on the hauling were with Mr. Curry, and Mr. Curry only?

(Testimony of J. W. Kay)

A. Mr. Curry, especially.

Q. You didn't know what his connections with Mr. Tunzi were?      A. No.

Q. You made your arrangement and fixed your prices for hauling with Mr. Curry?

A. The prices were fixed by the Railroad Commission, and we paid the Railroad Commission rates, and lived up to their rulings.

Mr. Morris: That is all.

#### Cross-Examination

Mr. Lounibos: Q. You had charge of issuing shipping orders on this hauling made by Curry, did you not?      A. Yes.

Q. You issued shipping orders in triplicate, according to the custom of your place of business?

A. Yes, I guess that is so.

Q. Your shipping orders would show the name of the carrier of your merchandise?

A. They are supposed to, yes.

Q. Were all of these shipping orders issued in the name of F. E. Tunzi?

A. I do not remember.

Q. I am showing you shipping orders Nos. 1, 2, 3, 4, and 5, all apparently issued by Basalt Rock—the name Basalt Rock appears as shipper, and F. E. Tunzi appears as carrier, and I will ask you to examine them; some of them are signed by you. I would ask you if those are the shipping orders involved in the transaction between yourself and Mr. Curry for the month of December, 1940.

(Testimony of J. W. Kay)

A. There is none of them that has my signature on.

Q. One has, if I am not mistaken, that is by Mr. Curry. You were shipper?

A. Basalt Rock Company.

Q. Look over these records issued by Basalt Rock, and would you say that there were five trips made for your company in December?

A. Yes. [74]

Q. *Those* of those trips were made to San Diego?

A. Two of them to San Diego.

Q. And two trips made to Redwood City, a trip down and a trip back?

A. I am not sure whether there were two trips to Redwood City, or one trip, let me see.

Q. Directing your attention to Nos. 4 and 5, that No. 4 dated December 22, shows a load of basalt?

A. That is right.

Q. Shipped to Redwood City?

A. Yes, and a load of cement returned.

Q. That makes a complete trip?

A. That makes a complete trip, yes.

Q. I now direct your attention to bill No. 3, which was, I suppose, issued by you, but the consignee's name is Gordon. Was that trip over to Davis, or Dixon? The consignee's address does not appear, and that is why I ask.

A. Well, I am pretty sure this was the Davis trip, or Dixon trip, although we have no contractor on our list of that name; it must have been one

(Testimony of J. W. Kay)

of the masons, or something like that, on the job.

Q. Then there was the Blumberg trip to Davis, California? A. Yes.

Q. No. 2? A. That is right.

Q. So that we have five shipping orders, two shipping orders showing trips to San Diego, and one trip to Davis, one to Dixon, and one to Redwood?

A. One round trip to Redwood City.

Q. A trip to Redwood City and a trip back?

A. Yes.

Q. Those were all made in December, 1940, and all of the shipping orders show the name of the carrier as F. E. Tunzi? A. That is right.

---

DENMAN R. CURRY,

Called for the Plaintiff; sworn. [75]

Mr. Morris: Q. You are Denman R. Curry?

A. Yes.

Q. Where do you reside, Mr. Curry?

A. At the present time I live at 129 Hitchborn street, Vallejo.

Q. In the month of December, 1940, where did you live?

A. Most of the time I lived with the truck on the road.

The Court: Q. You are a truck driver?

A. Yes.

(Testimony of Denman R. Curry.)

Mr. Morris: Q. Whose truck were you driving?

A. Tunzi's.

Q. That was in the month of December?

A. Well, it was in the month of December, I don't recall exact dates, but sometime in the month of December.

Q. Did you also have a trailer attached to that truck? A. Yes.

Q. And this truck and trailer, you say, belonged to F. E. Tunzi?

A. To the best of my knowledge, yes.

Q. When did you secure possession of that truck and trailer?

A. I could not give you the exact date, I think somewhere around the 8th or 10th of December.

Q. Of 1940? A. Yes.

Q. What was the reason that you were driving that truck and trailer beginning in December, 1940?

The Court: Q. Under what circumstances did you obtain possession of the truck?

A. Well, I had been wanting to get to work for myself, I had been working for wages for quite some time, and I knew Mr. Tunzi, in Petaluma, and I heard him speak about two trucks and trailers, that he had, and so I was interested in getting them and working them on shares, or working for him on wages, and Mr. Kay, the manager of the Basalt Plant, there, I knew moved a good deal of material, and I went to him and asked him about doing work, hauling material, if I could get a truck,



(Testimony of Denman R. Curry.)

and he told me, well, the first time I spoke to him about it, he [76] told me whenever anything came up worth while he would let me know. And then I heard of the San Diego haul, and I went to him and asked him about it, and he told me if I got a truck and trailer I could go to work, and I went to see Mr. Tunzi, and he said the truck was idle at the time and I could take it and go to work on the haul. I told him a good deal of hauling would later come up the valley, where we could get a back haul of hay, I believed.

Q. What arrangements did you make with Mr. Tunzi about the truck?

A. Well, I will tell you, there was not any definite arrangement made.

Q. Tell me what you said, and what he said.

A. Well, the best I can remember, I asked him about having a truck to use, if he had one, and he said if he could be shown where he could make some money perhaps he could arrange later to sell me a truck, I can't recall the exact words, only that he told me he would give me a truck, that I could go ahead and get what hauling I could and keep track of the work, and we would try to work out something that would be satisfactory to both of us.

Q. Did you have an understanding with him of what you were to receive for your services?

A. Not anything definite, no.

Q. That is so indefinite, I never heard anything like that. You mean to tell me you did not have



(Testimony of Denman R. Curry.)

any understanding with him, at all, of what you were to receive, and what you were to do with the truck, or what he was to receive?

A. I will tell you, as near as I can.

Q. Yes.

A. About the arrangements at the time I took the truck. I went to Mr. Tunzi; I met Mr. Tunzi with my wife, I had my wife with me, and I met Mr. Tunzi at Novato, where he had the trucks with Mr. Petersen, and we spoke about the insurance, and Mr. [77] Petersen said that we could probably work on his insurance, and Mr. Tunzi said that he had a Railroad Commission permit, and that I could work on that, and that after I made a few trips and showed what I could make on the trips, how much money we could make with the trucks, we could settle on what I would have for my wages. In fact, I don't think there was a word said about the wages part, only that I understood I would get something for wages.

Q. You expected to?

A. Sure, I expected to get my wages.

Q. Nothing was said about any amount you were to receive?

A. No, that is right.

Q. Tunzi had the truck and you took it and began hauling, is that right?

A. Yes.

Q. You heard Tunzi's testimony with respect to the amount of money that he gave you?

A. Mr. Tunzi gave me money a couple of different times when I needed money.

(Testimony of Denman R. Curry.)

Q. How much did he give you, in all?

A. I could not be exact.

Q. You don't remember at all?

A. I know that he gave me money a couple of different times.

Q. He said he gave you about \$130.

A. Well, I believe that he gave me that much money.

Q. This check of \$310.01, did you receive that from the Basalt Company?

A. I am not certain about that. I think I told them to mail that check, I could not be sure whether they mailed the check to Mr. Tunzi or whether I picked it up and gave it to him.

Q. In addition to that did you give Tunzi any money?

A. I think at the time I took the truck and trailer back to him I gave him a check of \$100—\$125 or \$135, I don't remember which.

Q. He said \$125. He said that the total amount that he received from the trucking when you had the truck was \$435.01. [78] That would include the \$310.01 from the Basalt Company, and \$125 you gave him.

A. That is correct—I could not be exact, but I think it comes nearly to that.

Q. What did you receive in addition to the \$130 that Tunzi gave you? What else did you receive?

A. It is pretty hard for me to tell you all I received, exactly, as I was buying grape stakes and

(Testimony of Denman R. Curry.)

selling them, and there was a good deal of expense coming out of the trucking, for gasoline, and re-capping tires, and the like of that; I could not be exact as to the amount.

Q. About how much? Did you keep any books on it?

A. Yes, I had some books on it. I had some figures, but I don't know what became of them. I have not kept any track of them.

Q. Do you think you made two or three hundred dollars in addition to the \$125 or \$130 that Tunzi gave you—I mean over costs, I mean net?

A. Yes, I would say that.

Q. Two or three hundred dollars in addition to that? A. Yes.

Q. You never had any settlement with Tunzi?

A. No, we did not.

Mr. Morris: Mr. Curry, you had a talk with Mr. Kay before you got this Tunzi equipment, isn't that true? A. That is right.

Q. And Mr. Kay told you that he had some hauling for you?

A. Not the first time I talked to Mr. Kay, no.

Q. But he did eventually tell you that he had some hauling for you? A. Yes.

Q. And you did not have any equipment at that time? A. No.

Q. What did you tell Mr. Kay? Did you tell him you could get a truck?

A. I told him I would try and get a truck.

(Testimony of Denman R. Curry.)

Q. Then did you go to Mr. Tunzi to get him to finance you on a truck?

A. I think the first time I saw Mr. Tunzi about a truck I did say something to him about financing me on a Ford truck that I thought I could buy, and he said that he had so much money tied up in [79] equipment he could not afford to finance any truck.

Q. Then the conversation drifted around, did it, to this equipment that he had?

A. Yes, I think that is it.

Q. Was that the first time you saw Mr. Tunzi, or some other time?

A. I think that was the first time, that he said—no, I am not certain about that—I don't think that he said that he had equipment at the first time I saw him. I think the next time I saw him, I saw him two or three times, I could not be exact—I knew for some time, and I was over there, I could not be exact whether I saw him two or three times before I got the truck, I would not be sure.

Q. Those two or three times before you got the truck, what did you see him for?

A. I saw him first about financing the Ford truck, but he said he could not finance it. The next time I think is when he told me that he would see Mr. Petersen and find out, he did not think the truck was working, and if I could get the work he would let me know. I think that was the second time, and then he said, "If I can get the truck you can come over and see me Sunday at Novato," and

(Testimony of Denman R. Curry.)

I think the third time I saw him was when I saw him at Novato.

Q. Had you got the work by then, the third time?

A. Yes, I had gotten the work.

Q. This was some hauling for the Basalt Company?

A. Yes.

Q. You also had in mind you might be able to do some hauling in the valley, later?

A. Later on.

Q. Later on in the month?

A. Yes.

Q. Did you tell Mr. Tunzi that?

A. I don't know exactly whether I did at Novato. I know that I said something, I don't know when. I told him that I understood the Bay Shore had a lot of material to go up to the Sacramento Valley, and that we could [80] probably haul hay, I merely felt that. I don't know whether there was much conversation on that point, or not.

Q. What did Mr. Tunzi say about letting you have this truck and trailer?

A. As I told you, I think I have tried to explain, as near as I could, that was the conversation that had taken place.

Q. Did he tell you at that time when you took the truck and trailer, what you could do with it?

A. I believe he did.

Q. And how you were going to pay for the use of his truck?

A. Well, I don't know that there was anything



(Testimony of Denman R. Curry.)

said about my paying for the use of the truck. I, of course, knew of two or three truck owners that have men working on them on a share basis for Basalt rock, and who pay them for their wages according to what they make. I was under the impression that we would get together Mr. Tunzi and I, after I made a few trips, and settle definitely the price that I was to get for my wages, but there was never, to my knowledge, mention of any definite wage that I was to get at the time I took the truck.

Q. There was nothing definite, that all depended on what you were able to earn?

A. That is what I understood, anyway.

Q. After you had deducted the expenses what were you to do with the profits?

A. Well, there was nothing definite on that. I was going on my own, on what I had in my mind to hold out at the end of the hauling, that was what was on my mind. What he had on his mind, I don't know.

Q. That you were to divide the profits after the expenses had been paid?

A. That was my thought.

Q. As far as any agreement was made, that was the agreement, is that right?

A. There was not any definite agreement of that kind.

Q. Mr. Tunzi told you to take the equipment and do what you could [81] with it?

A. That is it.

(Testimony of Denman R. Curry.)

Q. Now, did you divide the profits?

A. As I say, we never made any definite division; we never settled it to that extent.

The Court: Q. Why haven't you had a settlement with Tunzi?

A. Well, that was our personal business.

Q. I know, but I would like to know why you did not settle.

A. I can tell you my point of view.

Q. Yes.

A. I took the truck and told Mr. Tunzi that I would try and run it, and take care of it through the winter, and there would not be much money to be made through the winter, and when summer came I thought there would be plenty of work that we could do and get a good deal of hauling both ways, and he was not satisfied with the money that I brought in, and he asked for the truck back, and I had some money on hand at the time I turned the truck over to him, because he wanted it back, that I never turned in. I considered that was mine.

Q. Did you tell him what you had?

A. I did not. I told him I would give him back the cash that he advanced me, and I wrote him a check for \$125. That was cash, you understand, that he gave me to buy material.

Q. You returned it to him?           A. Yes.

Mr. Morris: Q. As I understand, that is the reason you kept what you took in and gave him \$125 that he advanced?

(Testimony of Denman R. Curry.)

A. No, I gave him \$125 that he gave me for the repair of the wreck, and a little money that he gave me in cash to buy grape stakes.

Q. How much money did he give you to buy grape stakes?

A. I could not be exact, whether it was a check or cash I can't remember, he may have a record of that, I believe it was \$25 or \$30.

Q. After you took this truck and trailer from Novato, where did you [82] take it?

A. I took it to Napa.

Q. Where did you keep it?

A. I kept it on the road most of the time.

Q. Did you garage it any place?

A. Only when I was repairing it.

Q. Where was it garaged at any time after it left Novato?

A. Well, I had it for four or five days in a garage in Napa, as I was fixing up the dummy axle on it, but outside of that I don't know that it was in a garage.

Q. You did the repair work?

A. I helped do the repair work, I was working with the mechanic.

Q. Did you pay for that work?

A. Out of the money that I took in, yes.

Q. Out of the money you took in?

A. Yes.

Q. When you were on the road with the truck where did you keep it, where did you garage it?

(Testimony of Denman R. Curry.)

A. I never garaged it.

Q. You slept on it along the road?

A. I slept right alongside, I had my bed with me, I had my camp stuff and bed, and I stayed right with it.

Q. And outside of the four or five days it was in the shop in Napa it was not garaged at all?

A. No.

Q. When you talked about this truck to Mr. Tunzi did you tell him about having the job to haul down to San Diego?

A. I believe I did, I don't know how many there was, but I think I spoke of having a trip to San Diego.

Q. While you had that truck was it ever garaged at Novato?      A. Not that I know of.

Q. Now, these grape stakes, when did you start hauling grape stakes?

A. I could not be exact on the date, it was sometime along Christmas time, in December, I don't know exactly, or January, I could not say exactly. I could look at my book and tell [83] you somewhere near the time I did.

Q. Does your book show you?

A. I can fix it by the date, there of my expenses, and tell about when it was. I think I could check back and find out about the date. I am not much of a bookkeeper. I don't think you could figure it out.

The Court: You may look at your book. You may step down while the Grand Jury is coming in.

(Testimony of Denman R. Curry.)

(After recess:)

The Court: Q. Did you look at your book?

A. Yes.

Q. Now, I understand you have looked at the book, and can you give Mr. Morris the date you were going to look up for him?

A. I looked up the items, and I can tell you about two dates, there, I think it was around the 5th of January, I could not say exactly when it was. I know I gave Daircott some expense money, and I see the first I gave him was on the 9th, and then on the 14th I gave him \$10—I could not tell you exactly about it, I was buying these grape stakes and selling them, and I did not keep an exact record on that, as to when I started up there; to tell you the truth, I don't know exactly when it was.

Mr. Morris: Q. You think it was somewhere around the 5th of January?

A. I think it was somewhere around the 1st of January.

Q. Around the 1st of January? A. Yes.

Q. But you did not keep any record of it?

A. No, not of the exact date.

Q. You had a helper, you say, on the truck?

A. He rode with me, I knew him for sometime before, and he was not working, and he said, "I will ride along with you on the truck for company," and I said, "Well, get on and ride along." That is how he came to be with me. [84]

Q. You paid him a little expense money?



(Testimony of Denman R. Curry.)

A. Yes, to live on.

Q. You say you were buying these grape stakes?

A. That is right.

Q. You were buying them up at what part of the State?

A. Well, I could not say exactly all the places that I bought them; I bought some in Mendocino, and I bought some in Humboldt. I think before this accident occurred I made a couple of trips to Piercy, and I don't know, of course, but I am kind of uncertain of exactly how many trips I made up there before this accident occurred, because of buying the stakes and selling them, don't you see, I had no way of keeping an exact record of the dates of the trips.

Q. You were paying for these stakes?

A. That is right.

Q. And hauling them down around Napa?

A. That is right.

Q. What were you doing with them when you got them down to Napa?      A. Selling them.

Q. You were selling them?

A. Yes. I would get orders for these grape stakes, and I would go up there and buy them, I would go to the ranchers and get orders, and I would go up and buy them and haul them down, and after I would deliver them they would pay me for them.

Q. What did you do with the money you got for them?

(Testimony of Denman R. Curry.)

A. As I say, I used it for expenses on the truck, and I kept some of it; we never settled for the money that I figured was mine, because the agreement was not definite, and I kept the balance of the money.

Q. Did you have any agreement with Mr. Tunzi to split the profits on those?

A. That was my understanding.

Q. Your understanding was that the profits you made out of the buying and selling of these grape stakes would be divided between [85] the two of you after you deducted the expenses?

A. That is what I understood.

The Court: Q. That is what you understood, that is what you had in your mind?

A. What I had in my mind.

Q. Mr. Tunzi did not say that to you, did he?

A. No.

Q. I understood you to say you had no agreement with him. You were merely to take the truck and make what money you could, and later on you thought you would have a talk about it and come to some agreement?

A. That is right.

Mr. Morris: Q. When Mr. Tunzi turned this truck over to you did he give any instructions about using it?

A. I think he mentioned to be careful of it, take good care of it.

Q. That is all you recall? A. Yes.

(Testimony of Denman R. Curry.)

Q. He did not tell you where you could drive it, or where you could not drive it?

A. Not to my knowledge.

Q. He did not tell you where to garage it, or where not to garage it?

A. Not that I know of.

The Court: Q. What was said about the insurance, if anything?

A. I think that he said that Mr. Petersen had it insured, and he would call up and tell him that I had the truck in my possession, and I think Mr. Tunzi and Mr. Petersen talked about that among themselves more than they were talking to me about insurance.

Q. You did not hear that conversation?

A. Well, I heard part of it, but I could not be exact as to what was said.

Mr. Morris: Q. How long did you keep this truck after the accident?

A. Well, I would not know exactly how long it was. It seems to me like it was about, less than thirty days, I believe.

Q. Had you been driving a truck of your own before you had this arrangement with Tunzi?

A. Had I been driving a truck on my own?

Q. Yes. A. At any time? [86]

Q. Yes.

A. I had sometime in my life been driving on my own.

Q. You said you made some repairs to the tires that you paid for out of the money that you took in.

(Testimony of Denman R. Curry.)

A. Yes, out of the money I took in.

Q. You paid for that out of the money you took in?      A. Yes.

Q. Did you make any changes in that truck and trailer after you got it?

A. I went to San Francisco after I made the trip to San Diego, and Mr. Tunzi got a rear end put in under the trailer, and new brakes.

Q. That is, before you started to use it?

A. No, that was after I had used it.

Q. Was that after you made repairs to it in Napa?

A. No, I think that was before the repairs on the truck that I made in Napa. The trailer repairs were made in San Francisco.

Q. Whom did you sell these grape stakes to, if you know?

A. Yes, I sold some of them to a Mrs. Fawver, at St. Helena, and a man that was foreman for Beringer Bros., I don't recall his name, he bought several thousand started a vineyard of his own.

Q. Did Mr. Tunzi get you any customers for hauling?      A. I don't recall that he did.

Q. You got all of those?

A. That was the understanding when I took the truck, that that was part of my work.

Mr. Morris: I believe that is all.

#### Cross Examination

Mr. Lounibos: Q. You referred to a repair bill in San Francisco.

(Testimony of Denman R. Curry.)

A. If I did I misspoke myself, that was not a repair bill, that was a replacement on the trailer.

Q. Who paid for that replacement?

A. Mr. Tunzi.

Q. It was not paid out of the earnings of this venture?

A. No. [87]

Q. But paid for out of his own pocket?

A. Yes, I had nothing to do with that, only I took the rig down there and stayed there until it was finished, and brought it back, and took him the bill, and he wrote a check out to the company.

Q. Do you remember in this conversation with Petersen that you told Petersen to notify the insurance company about the trip to San Diego?

A. I think that we spoke something about notifying the insurance company, there, on that day, but I would not be exact about that. I think Mr. Tunzi and Mr. Petersen did most of the talking about that. We all understood I was to make a trip to San Diego.

Q. Petersen said he would notify the company?

Mr. Morris: I object to what Petersen said.

The Court: Yes. It may go out. We will be in recess until two o'clock.

(A recess was here taken until 2:00 o'clock p. m.) [88]



Wednesday, March 25, 1942  
Afternoon Session—2:00 P. M.

DENMAN R. CURRY,

Cross Examination

(Resumed)

Mr. Lounibos: Q. Mr. Curry, you heard the testimony of Mr. Kay, of the Basalt Rock Company, did you? A. Yes.

Q. You heard him describe the different trips, five in all, that you made for the Basalt Rock Company? A. Yes.

Q. His statement was a correct statement of all the trips you made for the Basalt Rock Company in December?

Mr. Morris: I object to that as calling for the opinion and conclusion of the witness.

The Court: Sustained.

Mr. Lounibos: Q. Besides those trips and the trips in the Piercy territory, were there any other trips that you made in December or January, I mean in December, 1940 or January, 1941?

A. If you mean besides the two to San Diego and two to Davis, and the trip to Redwood City, and two trips to Piercy that I made up there, I believe I hauled a small load to Bodega Bay.

Q. Bodega Bay, in what county?

A. Mendocino—I think it is Mendocino.

Q. It is in Sonoma County.

A. Yes, in Sonoma.

Q. You started from Napa?

(Testimony of Denman R. Curry.)

A. I went through Petaluma, over to Bodega Bay.

Mr. Lounibos: I think that is all.

Mr. Morris: That is all. [89]

---

LEONARD R. TOBIN,

Called for the Plaintiff; Sworn.

Mr. Morris: Q. Mr. Tobin, what is your business?

A. Underwriter for the John E. Perry General Agency.

Q. Is that the general agency that wrote the policy for Mr. Tunzi that is involved in this litigation? A. Yes.

Q. Did you quote the rates on this policy?

A. I quoted them, yes.

Q. Did you give him the rates on this policy?

A. Yes.

Q. What rate based on the use of the truck not to exceed 100 miles from Novato did you quote?

A. On the 100-mile radius?

Q. Yes.

A. It would be the heavy class 3 plus 10 per cent.

Q. That figured how much?

A. Around \$380 and some odd dollars.

Q. Was that the rate at which this policy was written? A. Yes.

(Testimony of Leonard R. Tobin.)

Q. Now, might there have been a different rate for use of these trucks beyond the 100-mile radius?

A. Yes.

Q. I am referring now to this truck and trailer.

A. Yes.

Q. Did this rate you quoted, of \$387, include all of the equipment that is shown on this policy?

A. All of the equipment on that policy.

Q. Now, for coverage beyond 100 miles radius for that equipment is there a different rate?

A. Up to and including 150 miles the rate would be heavy class 3, plus a surcharge of 25 per cent, with a minimum premium of two times the heavy class.

Q. What would that premium be?

A. It would run around \$700.

Q. Beyond 150 miles what would be the premium for that equipment?

A. It would be around \$1000.

Q. That is the same equipment that is described in that policy?      A. Yes.

Mr. Morris: That is all. [90]

#### Cross Examination

Mr. Lounibos: Q. Do you know, Mr. Tobin, whether the Bankers Indemnity Insurance Company is a member of the National Bureau of Casualty & Surety Underwriters?

A. I believe they are.

Q. Is that company what you ordinarily call a board company?

(Testimony of Leonard R. Tobin.)

A. It is a conference company.

Q. Is it a board company, as distinguished from a conference company?

A. Well, I imagine it might be known as that.

Q. In determining the rate that was charged in this particular policy on a radial limit of 100 miles from Novato, do you take into consideration the accident liability loss in San Francisco?

A. It is possible that it would be.

Q. Do you know how the accident loss in San Francisco compares with the accident loss in the rest of California?

A. No, I do not.

Q. You do not know that it is or is not the heaviest ratio for accidents to premiums in the State of California?

A. According to the rate make-up, it should be.

Q. Now, so that I can get the mechanics of this, Mr. Tobin, in determining what you would charge Tunzi on this particular policy, you have a starting point inside of a circle which we will call Novato.

A. Yes.

Q. You are now going to regulate the use of the policy to a radius of 100 miles from that point in the center of the circle?

A. Yes.

Q. In order to determine what rate he is to be charged for this limited right to operate under your policy you do take into consideration the accident factors and ratio of loss in all localities within that circle, don't you?

A. Not in all cases; according to what the party

(Testimony of Leonard R. Tobin.)

is hauling, and who he is hauling for. [91] If he is hauling for one concern, for himself, it would be figured at a rate at where the truck is to be garaged.

Q. In other words, so that I understand you, under this particular policy, in determining what to charge Tunzi, you took the rates of the place where his equipment was to be garaged?

A. Yes.

Q. The Novato rate? A. Yes.

Q. And you did not consider the rate to be charged at any of the other cities or towns through which he might travel if he were to exercise his right to go not more than 100 miles from Novato?

A. That is right.

Q. Now, do you know what differences, if any, there would be between the premium rate to be charged for similar equipment if garaged at Napa, instead of at Novato?

The Court: I do not see how that is material. What is your idea about it?

Mr. Lounibos: My idea is try to find from this expert witness the basis for the increase from \$380 to \$700 once you get beyond the 100-mile limit.

The Court: I do not see how it would aid the Court in deciding this case. It is proper cross-examination, and I do not want to prevent you from pursuing it further if you wish.

Mr. Lounibos: There is an allegation in the complaint, if your Honor please, on page 7, line 24



(Testimony of Leonard R. Tobin.)

to 30, stating in substance that the premium rate was much greater.

The Court: The contract was for insurance at a certain rate, and it was paid for. Now, I am not interested in what the rate would be for, say, 150 miles. As I understand, the only question here is whether or not this truck was used outside of the territory described in the contract.

Mr. Lounibos: Regularly and frequently. [92]

The Court: Yes.

Mr. McKinnon: May I be permitted to make a statement? I do not know whether your Honor will allow me to.

The Court: You may, but usually it is limited to one counsel. If you wish to pursue it you may, but I do not see how it is material.

Mr. McKinnon: We would like to show where that would be very material.

Mr. Lounibos: I just want to ask a few questions more.

Q. Mr. Tobin, suppose this equipment was garaged at Napa, do you know what the rate would be then?

Mr. Morris: I object to that as immaterial.

The Court: Overruled.

A. There would not be any change in the rate, at all.

Mr. Lounibos: Q. If it were garaged, for example, at Santa Rosa.

A. No change at Santa Rosa.

(Testimony of Leonard R. Tobin.)

Q. No change, at all? A. No.

Mr. Lounibos: That is all.

Mr. Brazier: Q. Mr. Tobin, it is true, is it not, that the State is divided into various districts for rate-making purposes? A. Yes.

Q. And that San Francisco Bay Region is one of the high rate areas? A. Yes.

Q. Los Angeles is another high rate area, is that not true? A. Yes.

Q. And there are two or three other high rate areas, are there not? A. That is right.

Q. And then the rest of the State takes what is called the remainder of the State rate, does it not? A. Right.

Q. Now, is it not true that in Marin County the remainder of the [93] State rate prevails?

A. Yes.

Q. And in Sonoma County the remainder of the State rate prevails? A. Yes.

Q. In Mendocino County the same?

A. Yes.

Q. And in Humboldt County the same?

A. Yes.

Q. In other words, in most of the so-called cow or country counties the remainder of the State rate prevails and is the same, isn't that true?

A. That is right.

Q. So that the rate that you would charge for this particular equipment, if it had been used in Mendocino County, would be no greater and

(Testimony of Leonard R. Tobin.)

no less than the rate you charge in Marin County, isn't that true?      A. That is true.

Q. Now, if Mr. Tunzi's equipment were rated for use in Mendocino County and garaged at Ukiah, that 100 miles radius would take it into Humboldt County and down into Sonoma County?

A. Yes.

Q. And the rates there would be all the same, would they not?      A. That is right.

Q. And the risk of use of the truck in those particular counties would be less than the risk of use in San Francisco County, would it not?

A. That is a hard one to answer.

Q. Your rates are based upon the percentage of risk, are they not?      A. That is right.

Q. You have told us that the San Francisco rate, or the rate for San Francisco County and the Bay Region is one of the high rate areas of the State, is it not?      A. That is right.

Q. If this truck were to be garaged at Novato and used within 100 miles radius, it could have been used in San Francisco, Oakland, Berkeley, could it not?      A. That is right.

Q. It could have been used in a high risk area, could it not?      A. That is right. [94]

Q. And in an area where the risk was greater than if used in Mendocino and Humboldt Counties, isn't that true?      A. It might be, yes.

Q. What is your answer, "might be," or "Yes"?

A. Well, I guess, yes.

Mr. Brazier: That is all.

(Testimony of Leonard R. Tobin.)

Redirect Examination

Mr. Morris: Q. But the risk is greater where the equipment is used beyond the 100-mile radius?

A. Where it is used beyond 100 miles radius the rate is much higher.

Q. No matter where it is garaged?

A. That is right.

Q. Then the garaging would be the starting point of the rate? A. Yes.

Q. And the rate where it is used beyond 100 miles of the starting point is higher, that is, a \$700 rate beyond the 100 miles, and up to 150 miles? A. That is right.

Q. And when it goes beyond that it is around \$1000, that is, from the point of garaging?

A. Yes.

Q. That is the way the rates are fixed, is it not?

A. That is the way they are fixed.

Mr. Morris: That is all. Plaintiff rests.

---

JULIUS PETERSEN,

called for the Defendants; Sworn.

Mr. Lounibos: Q. Your name is Julius Petersen? A. Yes.

Q. Where do you reside? A. Novato.

Q. What is your business or occupation?

A. Trucking business.

Q. In July, 1940, were you using any equipment belonging to the defendant F. E. Tunzi?

A. Two trucks and two trailers.

Q. At that time did you place any public lia-

(Testimony of Julius Petersen.)

bility insurance upon [95] those trucks and trailers?

A. I did.

Q. With the plaintiff company? A. Yes.

Q. You have read the complaint in this case?

A. I have.

Q. You have seen the copy of the insurance policy attached? A. Yes.

Q. And that was the insurance policy that was issued upon these trucks and trailers in July, 1940?

A. Yes.

Q. Do you know where the insurance policy was deposited, if anywhere, after it was issued?

A. With the Railroad Commission.

Q. Was Tunzi a public contract hauler?

A. Tunzi was not a public contract hauler.

Q. But you were a public contract hauler?

A. Yes.

Q. Starting with the date of the policy, July 1, 1940, for how long a period thereafter did you continue to use the equipment covered by that policy belonging to the defendant Tunzi?

A. I used both trucks and trailers until in December, there, until the time I discontinued the use of the truck and trailer that is involved in this accident, and I continued using the other Diesel truck and trailer.

Q. Were both trucks and trailers covered by this policy?

A. They were both covered by this policy.

Q. Do you know what the premium was that was paid for that policy?



(Testimony of Julius Petersen.)

A. For the two trucks and trailers around \$390.

Q. And it covered two trucks and two trailers?

A. It covered two trucks and two trailers.

Q. Can you tell us about how many different trips you used the equipment covered by this policy on from July, 1940, up to the day that you turned over this one truck and trailer to the defendant?

Mr. Morris: I object to that as immaterial, and not involved [96] in this case.

Mr. Lounibos: I would like to be heard on that.

The Court: What difference does it make as to how many trips that Petersen made with the trucks?

Mr. Lounibos: Because I think we must measure the language of the policy, frequent and regular use, with reference to the duration of the policy.

The Court: We are not concerned with what he did with it, at all.

Mr. Lounibos: I think we are, your Honor. In other words, it is my idea that the policy was issued on the basis that the vehicles could not be used regularly and frequently beyond the 100 mile limit.

The Court: There is no complaint against Petersen for his use of the truck, as I understand it.

Mr. Lounibos: No. He disclaims all interest.

The Court: I say there is no complaint. It is immaterial how many times he used it. I do not see what difference it makes.

(Testimony of Julius Petersen.)

Mr. Lounibos: Q. How long did you say you had it—from July 1 to December?

A. About, yes.

Q. I suppose you used it continuously in your particular business?

A. I did.

Q. Were you working every day?

A. About every day.

Q. Nearly every day during that time?

A. Yes.

Q. You never took it beyond the 100-mile limit?

A. Never went out of the 100-mile limit.

Mr. Brazier: Might I inquire as to the equipment that is involved in this accident, the truck that you did not use after December, as to how many trips, all told, you made with that equipment?

A. With that equipment? [97]

Q. Yes.

Mr. Morris: I object to that as immaterial.

The Court: I do not see how it is material, Counsel.

Mr. Brazier: If I may be heard——

The Court: You need not argue it. Go ahead and ask the question.

Mr. Brazier: Q. Do you remember the question?

A. You asked me how many times I used that piece of equipment during the time I had it. I used it about every day I had it.

The Court: Q. There might have been some days you did not use it, but almost every day?

A. Almost every day.

(Testimony of Julius Petersen.)

Mr. Brazier: Q. Approximately how many trips would you say you took with it?

A. I might have made 200 trips.

Mr. Brazier: That is all.

The Court: Any cross-examination?

Mr. Morris: No cross-examination.

The Court: The next witness.

Mr. Lounibos: We would like to confer for one minute.

The Court: Yes.

Mr. Lounibos: Mr. Morris, can you stipulate to the fact that there would be considered read into the record the provisions of the State Highway Carrier Act?

Mr. Morris: I do not think that is necessary, your Honor. The Court will take judicial notice of it.

The Court: No, I will take judicial notice of it. I think those sections have already been called to my attention, have they [98] not?

Mr. Lounibos: They have. Would it be stipulated, Mr. Morris, that the policy involved in this litigation was deposited by your client, the Plaintiff, with the Railroad Commission, *under the* pursuant to the terms of the State Highway Carrier Act?

The Court: The face of the policy already introduced in evidence shows it was filed with the Railroad Commission July 12, 1940.

Mr. Lounibos: Would it be stipulated that F. E. Tunzi was operating as a carrier under the High-

way Carrier Act at the time of the issuance of this policy?

Mr. Morris: I will stipulate that he had license plates permitting him to do so. I won't stipulate that he was actually doing it, that he was operating.

Mr. Lounibos: But there were license plates for the operation on the vehicles involved.

Mr. Morris: Yes.

Mr. Brazier: Will you stipulate also that no notice of termination of the policy was ever filed with the Railroad Commission pursuant to the endorsement appearing on the policy?

Mr. Morris: I will stipulate that no notice of termination of the coverage granted by the policy was filed with the Railroad Commission.

Mr. Brazier: Nor any other notice filed with the Railroad Commission?

Mr. Morris: You mean prior to the accident?

Mr. Brazier: Yes.

Mr. Morris: Yes.

The Court: Is that all? [99]

Mr. Lounibos: The defendants rest.

The Court: Is that all, Mr. Morris?

Mr. Morris: That is all.

The Court: Do you wish to argue it?

Mr. Morris: No, I would prefer to submit it on briefs.

(Thereupon the case was submitted on briefs to be filed 10, 10, and 5.) [100]

[Endorsed]: Filed Apr. 25, 1942. [101]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

To Bankers Indemnity Insurance Company, a corporation, and to Charles B. Morris, Esq. and Carroll B. Crawford, Esq., attorneys for said Plaintiff:

You and each of you will please take notice and you are hereby notified that Eugene J. Westphalen, Charles Zanella and Aetna Casualty and Surety Company, a corporation, defendants in the above entitled action, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment herein entered on the 4th day of August, 1942, in favor of the said plaintiff and against the said defendants, and from the whole of said judgment.

Dated: September 3, 1942.

ELLIOT JOHNSON

Central Bank Building,  
Oakland, California.

ALBERT M. HARDIE

414 13th street, Oakland, California,

Attorneys for Defendants Eugene J. Westphalen and Aetna Casualty and Surety Company, a corporation



TAFT & SPURR

Marks Building, Ukiah, California,

Attorneys for Defendant

Charles Zanella

[Endorsed]: Filed Sept. 3, 1942. [102]

---

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the District Court of the United States for the Northern District of California:

You will please prepare a transcript of the records in the above-entitled action to be used upon appeal in said action, embodying the following:

1. Complaint with exhibits attached;
2. Answer of Defendants Westphalen and Aetna Casualty and Surety Company, a corporation;
3. Temporary Injunction;
4. Answer of Defendant Tunzi;
5. Answer of Defendant Petersen;
6. Answer of Defendant Curry; [103]
- 6½. Stipulation re Answer Westphalen and Aetna Casualty and Surety Company;
7. Answer of Defendant Zanella;

8. Memorandum and Order;
9. Findings of Fact and Conclusions of Law;
10. Judgment and Decree;
11. Notice of Appeal;
12. Designation of Record on Appeal;
13. Points on Appeal;
14. Transcript of Testimony at Trial.

ALBERT M. HARDIE

ELLIOTT JOHNSON

Attorneys for Defendants Eugene J. Westphalen  
and Aetna Casualty and Surety Company, a  
corporation.

TAFT & SPURR

Attorneys for Appellant

Charles Zanella

[Endorsed]: Filed Sept. 16, 1942. [104]

---

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH AP-  
PELLANTS INTEND TO URGE UPON  
APPEAL IN THE ABOVE ENTITLED  
ACTION

Eugene J. Westphalen, Charles Zanella and  
Aetna Casualty Company, a corporation, defend-  
ants and appellants in the above-entitled action,  
hereby present the following points which they in-

tend to urge and rely upon on appeal from the judgment in said action, to-wit:

That the judgment in the above-entitled action is contrary to law in that:

1. Said judgment purports to grant to the plaintiff above named an injunction restraining the defendants above named from taking further proceedings for any judgment or judgments against certain of the defendants for personal injury or property damages by reason of an alleged breach of an automobile liability insurance policy by the defendant Tunzi whereas in truth and in fact the [105] said policy of insurance had never been breached by the defendant Tunzi or by defendant Petersen;

2. Said judgment purports to grant to the plaintiff above named an injunction restraining the defendants above named from taking any further proceedings for any judgment or judgments against certain of the said defendants for personal injury or property damages by reason of an alleged breach by the defendant Fred E. Tunzi of a policy of automobile liability insurance issued by the plaintiff in that the truck and trailer involved in said action had not been principally garaged and used in the town of Novato, California, whereas in truth and in fact said truck and trailer had been principally garaged and used in the said town of Novato, California;

3. Said judgment purports to grant to the plain-

tiff above named an injunction restraining the defendants above named from taking any further proceedings for any judgment or judgments against certain of the said defendants for personal injury or property damages by reason of an alleged breach by the defendant Fred E. Tunzi of a policy of automobile liability insurance issued by the plaintiff in that the truck and trailer involved in said action had been rented or leased by the defendant Tunzi whereas in truth and in fact said truck and trailer had never been rented or leased by the defendant Tunzi or by defendant Petersen;

4. Said judgment purports to grant to the plaintiff above named an injunction restraining the defendants above named from taking any further proceedings for any judgment or judgments against certain of the said defendants for personal injury or property damages by reason of an alleged breach by the defendant Fred E. Tunzi of a policy of automobile liability insurance issued by the plaintiff in that the regular and frequent use of the truck and trailer involved in said action had not been confined to the territory within 100 miles of Novato, California, whereas in truth [106] and in fact the regular and frequent use of the said truck and trailer had been confined to the territory within 100 miles of said Novato, California;

5. Said judgment purports to grant to the plaintiff above named an injunction restraining the defendants from taking any further proceedings for

any judgment or judgments against certain of said defendants for personal injury or property damages for the reason that the truck and trailer involved in said action were not covered by the above mentioned policy of automobile liability insurance at the time of the accident mentioned in the complaint, whereas in truth and in fact the said truck and trailer were covered by said policy of automobile liability insurance at the time of the accident in question;

6. Said judgment purports to grant to the plaintiff above named an injunction restraining the defendants from taking any further proceedings for any judgment or judgments against certain of the defendants for personal injury or property damages for the reason that the plaintiff was under no liability to these defendants under its policy of automobile liability insurance whereas in truth and in fact the said plaintiff was liable to these defendants under and by virtue of the said policy of automobile liability insurance;

Said judgment purports to grant to the plaintiff above named an injunction restraining the defendants from taking any further proceedings for any judgment or judgments against certain of the said defendants for personal injury or property damages, notwithstanding the fact, as found by the said Court, that no notice of the cancellation of the said policy of automobile liability insurance



was ever given to the Railroad Commission of the State of California as required by law.

ALBERT M. HARDIE

ELLIOTT JOHNSON

Attorneys for Defendants Eugene J. Westphalen  
and Aetna Casualty and Surety Company

TAFT & SPURR

Attorneys for Defendant

Charles Zanella

[Endorsed]: Filed Sep. 16, 1942. [107]

---

District Court of the United States  
Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 107 pages, numbered from 1 to 107, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Bankers Indemnity Insurance Company, a Corp., Plaintiff, vs. Eugene J. Westphalen, et al., Defendants. No. 21865-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Nine-dollars and five-cents

(\$9.05) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 12th day of October A. D. 1942.

[Seal]

WALTER B. MALING

Clerk

WM. J. CROSBY

Deputy Clerk

---

[Endorsed]: No. 10286. United States Circuit Court of Appeals for the Ninth Circuit. Eugene J. Westphalen, Charles Zanella and Aetna Casualty and Surety Company, a corporation, Appellants, vs. Bankers Indemnity Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 13, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit  
No. 10286

EUGENE J. WESTPHALEN, AETNA CAS-  
UALTY AND SURETY COMPANY, a cor-  
poration, and CHARLES ZANELLA,  
Appellants,

vs.

BANKERS INDEMNITY INSURANCE COM-  
PANY, a corporation,  
Appellee.

STATEMENT OF POINTS AND DESIGNA-  
TION OF RECORD ON APPEAL IN  
ABOVE COURT

The appellants above named hereby adopt the statement of points and the designation of parts of record to be printed filed in the District Court and contained in the Clerk's certified transcript of record as a compliance with Subdivision 6 of Rule 19 of the Rules of Practice of the Circuit Court of Appeals.

Dated: October 13, 1942.

ALBERT M. HARDIE  
ELLIOTT JOHNSON

Attorneys for Appellants Eugene J. Westphalen  
and Aetna Casualty and Surety Company, a  
corporation.

TAFT & SPURR

Attorneys for Appellant  
Charles Zanella

[Endorsed]: Filed Oct. 15, 1942.

[Title of Circuit Court of Appeals and Cause.]

APPELLANTS' AMENDED DESIGNATION  
OF RECORD ON APPEAL

Appellants having first obtained leave of the Court, file this their amended designation of record pursuant to Rule 19, Subdivision 6, of the Rules of Practice of the above-entitled Court and state that the record necessary for consideration on appeal is the entire record on appeal as certified and transmitted by the Clerk of the District Court of the United States for the Northern District of California to the Clerk of the above-entitled Court, with the exception of Part One of Exhibit A attached to the complaint of the appellee filed in said District Court, commencing with the words "Part 1, The Columbia Fire Insurance Company" on page 1 of said exhibit (on page 15, Certified Transcript) all of page 2, said exhibit (page 16 Transcript) to and including the signature of Paul B. Simmons and the word "President" on page 3, exhibit (on page 17 Transcript).

Dated: October 22, 1942.

Receipt of a copy of within amended designation of record on appeal is hereby admitted this October 22, 1942.

ALBERT M. HARDIE

ELLIOTT JOHNSON

Attorneys for Appellants Eugene J. Westphalen

and Aetna Casualty and Surety Company, a corporation.

TAFT & SPURR

Attorneys for Appellant

Charles Zanella

CHARLES B. MORRIS

CARROLL B. CRAWFORD

Attorneys for Appellee

[Endorsed]: Filed Oct. 22, 1942.